047

IN THE
SUPREME COURT
OF FLORIDA

NO. 80,435

FRANK R. BRANCA,

Petitioner,

v.

CITY OF MIRAMAR,

Respondent.

PETITIONER'S REPLY BRIEF

BRUCE ROGOW
Florida Bar No. 067999
BRUCE S. ROGOW, P.A.
2441 S.W. 28th Avenue
Ft. Lauderdale, Florida 33312
(305) 767-8909
and
BEVERLY A. POHL
Florida Bar No. 907250
Suite 200
350 S.E. Second Street
Ft. Lauderdale, Florida 33301
(305) 767-8909

Co-Counsel for Frank R. Branca

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I.

JURISDICTION IN THE FLORIDA SUPREME COURT

The City of Miramar has raised the issue of this Court's jurisdiction. Both parties agree on the pertinent Florida Constitutional provisions, Art. V, § 3(b)(3) and § 3(b)(4), which in the appropriate case confer jurisdiction because of a district court's construction of a state constitutional provision, or because of a certified question. Petitioner's position is that discretionary jurisdiction exists in this case under either provision, and the important constitutional question which is and always has been the heart of this case must be finally resolved. The disagreement posed by the City is based on inapplicable case law, and its arguments in opposition to the exercise of jurisdiction should be rejected.

The City relies on Armstrong v. City of Tampa, 106 So. 2d 407 (Fla. 1958), decided ten years before the adoption of the present state constitution. This Court declined to accept *direct appeal jurisdiction* after appellants' case was dismissed by the trial court. The denial recognized that the district courts of appeal were the proper courts for direct appeals, except in the most exacting of circumstances. Id. at 410 ("Any contrary view could conceivably result in bringing practically every erroneous decree or judgment directly to this court."). The decision was crafted so as not to usurp the jurisdiction of the district court.

The instant case bears no resemblance to Armstrong, either factually, procedurally, or constitutionally. Thus, Armstrong's analysis of the difference between "applying" a constitutional provision and "construing" a constitutional provision need not be superimposed upon this case, which seeks discretionary review of a decision of a district court of appeal via either of two available constitutional avenues.

Nor is Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973) applicable. There, the constitutional question was raised for the first time in the district court of appeal, and was not discussed or referred to in that court's opinion. This Court rejected the argument that the constitutional question was "inherent" in the lower court's decision, and found no jurisdiction. In this case, in contrast, the state constitutional question was not an afterthought. The constitutional question was the basis of the Complaint (R 305,368), and was argued vigorously at every stage, unlike the tangential constitutional question in Ogle v. Pepin. The funding provisions of Ordinance 88-16 can be invalid under Chapter 112, Part VII only if Article X, § 14 applies. Thus, the Fourth District's narrow statement that it "need not resolve the issue of whether the Ordinance's enactment constituted an 'increase' in benefits under Article X, Section 14" does not mean that the court did not actually construe the Constitution. It had to construe the Constitution to address and affirm the trial court decision. But for Article X, § 14's actuarial requirements, there would be no basis for this case, from its inception to the present.

Additionally, discretionary jurisdiction exists because the Fourth District Court of Appeal certified a question of great public importance to this Court. Art. V, § 3(b)(4). The City claims that the district court did not "pass upon" the question, and jurisdiction is absent, citing Revitz v. Baya, 355 So. 2d 1170 (Fla. 1977).[1] Revitz is distinguishable because there the certified question was not essential in the case, rather it was a gratuitous footnote to a district court of appeal decision based on entirely separate grounds. In this case, the court below affirmed the trial court's finding that the creation of a new plan is an increase in benefits, and certified the question of whether Art. X, § 14 applies in such a circumstance. The district court could not have affirmed the trial court without passing upon the constitutional issue, and deciding as it did that Ordinance 88-16 violated the constitution.

Article X, § 14 has always been the central issue in this case; indeed it was the genesis of the case. (See Amended Complaint pp. 10, 12; and Dept. of Administration letter, Complaint Appendix D, R 403). For the City to now claim that this Court is precluded from review, despite a certified question, despite the constitutional basis of the decisions below, and despite the City's constitutional postulation as its *raison d'etre* for seeking to

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[1] We argued in the Initial Brief that the district court necessarily viewed Ordinance 88-16 as an increase in benefits, in order to justify affirming the trial court's order which had made that factual finding, (Initial Brief Exh.D p.2 para. c.). The formulation of the certified question reflects the district court's doubt about that view, and its judgment that this Court needs to resolve the important question.

declare invalid its own duly enacted law, bespeaks a misunderstanding of this Court's Article V power.

II.

THE DECISIVE DEFINITION: WHAT IS AN "INCREASE IN BENEFITS?"

The reason Ordinance 88-16 has been deemed invalid is that it is not funded on an actuarially sound basis as required by Article X, § 14, *as implemented by* Chapter 112, Part VII. The Article X, § 14 requirement applies to increased benefits. Therefore if the establishment of a new pension plan where there was none extant is not an "increase in benefits" under Article X, § 14, the requirements of the implementing legislation are inapplicable. The City argues that it would be "absurd" to require that increases to existing plans be actuarially sound, without imposing the same requirements on newly created plans. (Respondent's Brief. p.22). In support of the argument, the City quotes from the legislative intent in the implementing legislation for Ch. 112, Part VII. (Id. at 23). We submit that that begs the question, because Ch. 112, Part VII can only implement that which the Constitution addresses. One must look first and only to the constitutional provision to determine when it applies.

It is neither "hyper-technical" nor "absurd," as the City claims it is, to give words in the Constitution their plain meaning. Article X, § 14 speaks of an "increase in the benefits...of such system," which plainly contemplates that members

of an existing system will receive additional benefits. "Increase" means going from something, to something more. It is verbally and conceptually different from the "creation" or "establishment" of benefits, which means going from nothing to something. The Constitution could have read: No pension system shall be funded by future taxpayers. In that hypothetical instance, both newly-created 88-16 and increases to existing plans would be required to be funded on an actuarially sound basis. But this case is different; the Constitution speaks only of an "increase in benefits" and, whatever the wisdom, its language does not cover a newly-created plan. Thus, the intent of the Legislature in enacting Ch. 112, Part VII is irrelevant because those statutes are to implement Art. X, § 14.

III.

THIS COURT NEED NOT DEFER TO AN ADMINISTRATIVE OPINION LETTER PROVIDED TO THE CITY BY THE DEPARTMENT OF ADMINISTRATION

The City proposes that this Court should defer to the finding by the Department of Administration (R. 334-338) that Ordinance 88-16 violates Art. X, § 14. (Respondent's Brief p.25). Aside from the fact that the "finding" here is only the opinion of a lawyer for the Department, it is elementary that an administrative agency is without authority to decide the constitutionality of an ordinance. Palm Harbor Spec. Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987). That

responsibility rests with the judiciary, not Stanley Danek, Senior Attorney of the Division of Retirement.

None of the cases cited by the City in support of their deference-to-administrative-agency argument involved constitutional questions. This difference is critical, and Mr. Danek's legal opinion is entitled to no deference by this Court, or by any court.

IV.

SECTION 112.048, FLORIDA STATUTES PROVIDED NO BENEFITS TO BRANCA AT RETIREMENT AND PROVIDES NO BENEFIT TO THE CITY'S ARGUMENT THAT 88-16 WAS AN INCREASE IN BRANCA'S BENEFITS

In our Initial Brief we referred to the pension described in § 112.048, Fla. Stat. as a "state" pension, because it describes state mandated benefits to certain elected officials after 20 years of service. The City now argues that the § 112.048 pension is a present *city* pension, because the statute provides for funding through the city.[2] Calling § 112.048 a city pension does not make Ordinance 88-16 an increase in benefits for Branca, however, *unless* at the time of his retirement he could have claimed his benefits under § 112.048. The City denies that is so. If he could (or can

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[2] The City's new argument is contrary to the trial court's explicit finding that "no City of Miramar retirement benefits existed for elected officials prior to the enactment of Ordinance No. 88-16..." (Initial Brief Exh. D, p.2). Oddly, if that is so, and 88-16 had never been enacted, at the end of 20 years of municipal service every city, including Miramar, would have to provide pension benefits which would then be funded out of future taxpayer revenue.

now) claim § 112.048 benefits, this case is much ado over nothing.

We argued in the Initial Brief that Ordinance 88-16 was not an increase in the benefits available under § 112.048 *because at the time of Branca's retirement no benefits were available to him under that statute*. The fallacy of the City's present position--that Branca did have benefits under § 112.048--is that if it were true, Branca would have met the 20 year requirement of that statute through his buy-back of four years for military service, and could claim a pension under § 112.048 if Ordinance 88-16 is determined to be invalid. We presume that the City would then contest his entitlement to benefits under § 112.048, which then would be inconsistent with the City's present argument that Branca had existing benefits under the statute when he retired. Either he did or he did not. The City cannot have it both ways.

V.

AD HOMINEM HYPERBOLE

Throughout the City's Brief is a recurring subliminal theme that Branca's position is tainted by self-interest.[3] The record in this case does not support the negative inference. We

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[3] See, for example, "This case revolves around the Ordinance which was originated by then-Mayor Branca..." (Respondent's Brief p.5). "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." (Id. at 6). "[A]n actuarially unsound pension plan proposed by the City's mayor just prior to his retirement." (Id. at 16). "Enforcement of the Ordinance would reward a public official who initiated a City ordinance for his own financial gain." (Id. at 36).

set forth in our Initial Brief at pp. 4-8 the detailed process by which the ordinance was conceived, drafted, reviewed by experts and the City Attorney, revised, and ultimately approved by the City Commission (four to one without any vote by the mayor) in the ordinary course of business. It is true that Frank Branca was mayor during that time, but neither evidence nor inference indicates any impropriety on his part.

Even if Frank Branca had taken pen to paper and drafted Ordinance 88-16 himself--which he did not--the issue before this Court would be one of law, not politics. Quite simply, did Miramar pass a defective law, and if it did, who--Miramar or Branca--must suffer the consequences?

VI.

ESTOPPEL AS A VIABLE BASIS FOR REVERSAL

The equitable defense of estoppel applies to achieve a just result when an aggrieved party has no adequate remedy at law. See Yorke v. Noble, 466 So. 2d 349 (Fla. 4th DCA 1985), approved by 490 So. 2d 29 (Fla. 1986). If the decision below is correct, that Ordinance 88-16 is invalid--indeed void--because of a Miramar-designed deficiency, Branca would have no adequate remedy at law against the City. In effect, the City would be shielded from honoring its duly enacted laws and its economic obligations, leaving cities free to pass laws, sue to declare them unconstitutional, and then void their obligations. Such a

perversion of governmental accountability is unconscionable, and rectifiable through the doctrine of estoppel.

In its brief, the City's argument diverges from an attack upon Ordinance 88-16 to an attack upon its only beneficiary:

> 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.

(Respondent's Brief p. 36) (emphasis supplied). The absurd and unsupported by the record suggestion that Branca, a non-lawyer, considered the elements of a future estoppel argument when he retired, illustrates that politics, not policy, drives the City's position.

The City attacks Branca's policy arguments to justify its denial of Branca's pension benefits:

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

(Respondent's Brief p. 36-37) (emphasis supplied).

It is. The public policy of Florida is in favor of pensions for municipal officials. See Fla. Stat. § 112.048. The public policy of Florida is in favor of the presumption of validity of duly enacted laws. See Life Concepts, Inc. v. Harden, 562 So. 2d 726, 727 (Fla. 5th DCA 1990). The public policy of Florida is

in favor of governmental entities keeping their factual promises. Those policies and the duties of courts to enforce them, are in no way undermined by a city being compelled to deal fairly, nor are they undermined by Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990), relied upon heavily by the City.

Rather than being a "sweeping opinion" as suggested by the City (Respondent's Brief p. 37), Richmond is a case decided on narrow grounds: a federal litigant cannot use the doctrine of estoppel offensively against the Government to obtain funds not appropriated, because the Appropriations Clause of the United States Constitution precludes the payment of funds from the Treasury unless it has been appropriated by an act of Congress. Id. at 2471. Richmond does not address the situation presented here: the government which enacted the law seeking to avoid its strictures by declaring its own action unconstitutional.

Richmond sought to apply estoppel against the Government after he was denied six months of pension benefits because of incorrect Government advice by a government employee. The government employee giving the advice relied upon the terms of a *repealed* statute (unlike this case, where Branca retired in reliance on an existing statute). The statute had been revised, rendering the employee's advice inaccurate. Id. at 2468. In denying Richmond's claim, the Court discussed the general rule limiting estoppel claims against the government, but refused to close the door to estoppel being applied in the correct circumstances. Id. at 2472. Richmond involved an employee giving

advice which was inconsistent with the law. The Court rejected a suggestion that the government must always be bound "by its agents statements." Id. at 2476. Here we are suggesting something different--that the government must be bound by its own statements: its properly enacted laws and the fact of a pension authorized by that law. If the City's law does conflict with the Florida Constitution then the City, not Branca, must suffer the economic pain of being estopped. Branca is faced with a permanent and total forfeiture of his vested pension benefits, despite the clear legislative action of the City to provide those benefits. This case compels the use of estoppel against Miramar, as contemplated by the Supreme Court and as applied both before and after Richmond by the lower courts.

Federal courts have not viewed Richmond as a bar to estoppel claims against the Government. See Howard Bank v. United States, 759 F.Supp. 1073, 1079 (D.Vt. 1991). Florida courts faced with the requisite criteria for estoppel have continued to estop state government, despite the general language in Office of Personnel Management v. Richmond. See Alachua County v. Cheshire, 603 So. 2d 1334 (Fla. 1st DCA 1992):

> In addition to the usual elements of estoppel, a party seeking to invoke estoppel against the government going beyond mere negligence; that the government's act will cause serious injustice; and the imposition of estoppel will not unduly harm the public interest. S & M Investment Co. v. Tahoe Regional Planning Agency, 911 F.2d 324, 329 (9th Cir. 1990), cert. denied, 111 S.Ct. 963 (1991). However, it is

> not necessary to prove intentional deceit on the part of the government. Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067, 1071; and Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988). While it is true that equitable estoppel is only rarely applied against the government, Dolphin Outdoor Advertising v. DOT, 582 So. 2d 709 (Fla. 1st DCA 1991), courts do apply estoppel against the government in appropriate circumstances.

See also, Harris v. Dept. of Admin., 577 So. 2d 1363, 1366-1368 (Fla. 1st DCA 1991).

This is an appropriate circumstance. The City of Miramar should be estopped from denying pension benefits to Branca on the basis of its own legislative enactment.

CONCLUSION

For the foregoing reasons, the certified question should be answered by finding that Article X, § 14's "increase in benefits" language does not apply to newly created plans; that a city may not sue to declare its own ordinances unconstitutional; or if it can, and if Miramar Ordinance 88-16 does violate Article X, § 14, the City is estopped from denying a pension to an elected official who relied upon the ordinance and retired upon that reliance.

Respectfully submitted,

BRUCE ROGOW
BRUCE S. ROGOW, P.A.
Florida Bar No. 067999
2441 S.W. 28th Avenue
Ft. Lauderdale, FL 33312
(305) 767-8909
and

BEVERLY A. POHL
Florida Bar No. 907250
350 S.E. Second St., Suite 200
Ft. Lauderdale, FL 33301
(305) 767-8909

Co-Counsel for Frank Branca

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the foregoing has been furnished to JOSEPH H. SEROTA, Esq., WEISS SEROTA & HELFMAN, P.A., 2665 South Bayshore Drive, Suite 204, Miami, FL 33133, counsel for the City of Miramar, by U.S.Mail this 18th day of January, 1993.

BRUCE ROGOW