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July 21, 2021

Via electronic mail

Ms. Alison A. Rogers
Escambia County Attorney
aarogers@co.escambia.fl.us

Re: Local Annuity Program Opinion Letter; Requested Clarification

Dear Ms. Rogers:

This letter provides clarification regarding my legal opinion related to the issues addressed in my prior correspondence of July 2, 2021. You requested I elaborate on the following issues regarding the interaction of the County's Local 401(a) Annuity Program and chapter 145, Florida Statutes, among other topics. I have slightly rephrased and/or consolidated your requests for clarification as raising the following issues:

1. *Would the County Board's potential provision of a monetary resolution to what the Board deems to be the affected group of elected officials who did not take advantage of the County's local annuity program due to a lack of information about the program be contrary to the limitation on extra compensation for County Commissioners in chapter 145, Florida Statutes?*

2. *Does the County's current or prospective use of the 401(a) Annuity Program violate the law by, among other things, providing extra compensation to the Elected Officers Class above the statutory limit in chapter 145, Florida Statutes?*

3. *Assuming the answer to question 2 is "no," does the County's use of the raw FRS rates of employer contribution affect the legality of the continued or prospective use of the 401(a) Annuity Program?*

4. *If the answer to any of these questions hinges on whether the ICMA 401(a) program is an annuity insurance program, can you provide guidance on what would distinguish the current ICMA product from an annuity insurance product?*

In sum, it is my opinion that the County Board's provision of a monetary resolution as contemplated would not be violative of chapter 145, Florida Statutes, because such a payment would not be defined as "compensation" under the law.

Further, it is my opinion that the County's continued use of the Local 401(a) Annuity Program is supported by its home rule powers and chapter 121's allowance for the investment of funds and creation of local supplemental retirement programs for payment of annuities for county personnel. Finally, the use of the 401(a) program at the current rates of contribution is not contrary to the law, provided the rate ensures the program's actuarial vitality. A detailed analysis of each issue listed is as follows.

1. **Would the County Board's potential provision of a monetary resolution to what the Board deems to be the affected group of elected officials who did not take advantage of the County's local annuity program due to a lack of information about the program be contrary to the limitation on extra compensation for County Commissioners in chapter 145, Florida Statutes?**

In my opinion, the provision of a potential monetary resolution to affected officials would not be contrary to chapter 145's limitation on extra compensation because, similar to my analysis of the issue previously raised with regard to section 215.425, Florida Statutes' applicability, such a potential payment would not qualify as prohibited "compensation" for services rendered in office.

As mentioned in my July 2, 2021, correspondence, in Florida, the state constitution and chapter 145 of the Florida Statutes act to limit the amount of compensation provided to county elected and appointed officials. *See* s. 5(c), Art. II, State Const.; Ch. 145, Fla. Stat. Specifically, section 145.031, Fla. Stat., expressly limits the amount of "salary" each county commissioner may receive based on the county's population. § 145.031(1), Fla. Stat. "Salary" is defined by section 145.021, Florida Statutes, as "the total annual compensation to be paid to an official ***as personal income***." §145.021(2), Fla. Stat. (emphasis added). Other provisions of chapter 145 reinforce the reading that chapter 145 places limits solely on the fiscal compensation provided to county commissioners and other elected officers in exchange for their services rendered in office, rather than compensation received to offset other expenses or monetary claims. *See, e.g.*, § 145.17, Fla. Stat. (providing chapter 145 sets the limit of compensation for county officials' "execution of their official duties"); *Cf. also Askew v. Green, Simmons, Green and Hightower*, 348 So. 2d 1245, 1247 (Fla. 1st DCA 1977) (ordinance allowing payment of reasonable attorney fees for past and present county commissioners who successfully defend a prosecution for violation of the open meetings law was not an unlawful supplement to the compensation of county officers).

Here, it is my opinion that the payment contemplated by the Board would not fall into the definition of "salary" or other compensation otherwise prohibited by chapter 145, Florida Statutes, and would therefore be legal, because the payment would be intended to compensate potential claims for alleged damages sustained due to the purported failure of providing adequate information regarding the Local 401(a) Annuity program. Because the provision of such a payment would be in exchange for the resolution of any nascent legal claims against the County—as opposed to the rendition of services in

office—the payment would not be considered compensation under the purview of chapter 145 and would therefore not be prohibited under the law. Accordingly, I do not believe such a payment would be prohibited.

2. **Does the County's current or prospective use of the 401(a) Annuity Program violate the law by, among other things, providing extra compensation to the Elected Officers Class above the statutory limit in chapter 145, Florida Statutes?**

It is my opinion that the County is duly authorized by chapters 121 and 125 of the Florida Statutes to create and administer the Local 401(a) Annuity Program. Further, because the County is duly empowered by general law to create, administer, and issue contributions pursuant to the Local 401(a) Annuity Program, any such contributions received by County Commissioners do not violate chapter 145, Florida Statutes' prohibition against extra compensation. Overall, it is my opinion that the County's use of the Local 401(a) Annuity Program complies with the law.

As stated in my prior correspondence, Florida counties are broadly empowered with home-rule authority. *See* Article VIII, section 1(f), Fla. Const. (providing counties have "such power of self-government as is provided by general or special law"). The Florida Supreme Court has observed that "[u]nless the legislature has pre-empted a particular subject relating to county government by either general or special law, the county governing body . . . has full authority to act through the exercise of home rule power." *Speer v. Olsen*, 367 So. 2d 207 (Fla. 1978).

Section 121.182, Florida Statutes, further expands these powers by explicitly permitting state municipalities and counties to create certain local retirement programs for the benefit of county personnel. Specifically, section 121.182 states in pertinent part, "[m]unicipalities and counties are authorized ***to invest funds***, ***purchase annuities***, **or** ***provide local supplemental retirement programs*** for purposes of providing annuities for city or county personnel." § 121.182, Fla. Stat. Section 121.182's sole limitation[1] is that these retirement programs comply with section 14, Article X of the State Constitution, which mandates that local retirement programs be "actuarially sound."

Finally, regarding compensation paid to County Commissioners, the salary and compensation limitations imposed by chapter 145 only prohibit benefits not otherwise authorized by general law. *See* § 145.131(2), Fla. Stat. ("The compensation of any official whose salary is fixed by this chapter ***shall be the subject of general law only***" (emphasis added)); *cf. also, In re Mr. James G. Yaeger*, 1991 Fla. Op. Atty. Gen. 207 (1991) ("[I]n the absence of ***specific statutory authority for a county's contribution to***

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[1] Section 121.182, Florida Statutes, also provides for certain tenure limitations on annuities purchased on behalf of personnel. However, my reading of the statute is that these limitations only apply to actual annuity insurance policies purchased by the County, and the not local supplemental retirement programs authorized by the last sentence of section 121.182, Florida Statutes.

a private retirement fund on behalf of a county commissioner, such a contribution would appear to be additional, unauthorized compensation.")[2] Accordingly, where compensation is authorized by the Florida Statutes, it is not otherwise prohibited or subjected to local limitation through chapter 145.

Here, the County utilizes the Local 401(a) Annuity Program as a defined-contribution program similar to the Florida Retirement System Investment Plan. The County has contracted with a provider, ICMA, to administer the 401(a) Annuity Plan. Through this contract, the County has agreed to submit employer contributions which match the FRS rates of contribution for employees from discreet FRS classes, i.e., the Senior Management Service and Elected Officials classes, who elect to withdraw from the FRS and participate in the 401(a) Annuity Program. As an investment plan authorized by section 401(a) of the Internal Revenue Code, any distributions from the 401(a) program may take the form of an annuity payment to the benefit of the retiree. *See* 26 U.S.C. § 401(a)(11). Funds and contributed to and invested in the account until the retirement date provided for in the agreement with ICMA. *Id.*

Considering the law as applied to these facts, it is my opinion that the County's use and contribution to the 401(a) Local Annuity Program is legal and does not violate chapter 145, Florida Statutes. Initially, the program is explicitly authorized by section 121.182, Florida Statutes, in that the County uses the program to provide for investment opportunities for county personnel, i.e., County Elected Officers and Senior Management Service employees. The funds invested may, but do not necessarily, take the form of actual annuities procured on behalf of the employees. However, funds in each individual account are distributed in accordance with section 401(a) of the Internal Revenue Code in the form of an annuity payment. Accordingly, general law authorizes these actions; as a fund invested to pay an annuity payment, the program is explicitly authorized by section 121.182, Florida Statutes. Further, the program complies with chapter 145 through its authorization under the general law. Contributions under the program are explicitly contemplated by section 121.182 and not otherwise prohibited. *See* § 145.131(2), Fla. Stat.

In light of the foregoing, I would clarify my correspondence of July 2, 2021, by answering this question in the negative. It is my opinion that the Local 401(a) Annuity Program is legal.

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[2] Notably, the Florida Attorney General's opinion in *In re Mr. James Yaeger*, was rendered in 1991, five years before the passage of section 121.182, Florida Statutes. *See* 1991 Fla. Op. Atty. Gen. 207 (1991); *see also* s. 10, ch. 96-368, *Laws of Fla*. Accordingly, the Attorney General did not have the benefit of the specific statutory authority authorizing the creation and utilization of local supplemental retirement programs like the Local 401(a) Annuity Program in holding that payments to private retirement programs violated chapter 145, Florida Statutes.

3. **Assuming the answer to question 2 is "no," does the County's use of the raw FRS rates of employer contribution affect the legality of the 401(a) Annuity Program?**

It is my opinion that the County is authorized to utilize any rate of contribution it wishes in the Local 401(a) Annuity Program so long as the rate ensures the program is "actuarially sound" pursuant to section 14, Article X. Accordingly, it does not appear that the utilization of the raw FRS rates of contribution would be prohibited or otherwise illegal.

As noted above, the Local 401(a) Annuity Program is vivified predominantly by section 121.182, Florida Statute's plain language. Notably, however, this language is silent with regard to the rates of contribution to be utilized by county or municipal supplementary investment programs. Rather, as mentioned previously, the sole limitation is that the rate of contribution maintain the program's "actuarial soundness" as described in the Florida Constitution. *See* § 121.182, Fla. Stat.

It appears the County has contracted to provide rates of contribution for the Elected Officers class which match those used for its FRS programs. It is my opinion that, overall, the specific rate utilized by the County is immaterial to the program's legality so long as the rate is sufficient to ensure the actuarial health of the program. Accordingly, the specific rate used by the County would predominantly be the subject of the contractual agreement between the County and the 401(a) program administrator, ICMA, rather than the County and a limiting statute.

Further, while I will refrain from rendering an opinion on the actuarial health of the Local 401(a) program—as that is beyond the scope of your request—the fact that the Local 401(a) Annuity Program costs the County the same amount of money in the form of contributions to employees as the FRS programs would appear to suggest that the program does not have an outsized effect on the County's budget as compared to the FRS retirement options.

I would clarify my July 2, 2021, correspondence by also answering this question in the negative.

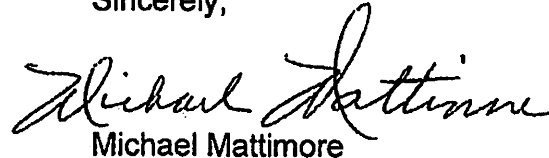
4. **If the answer to any of these questions hinges on whether the ICMA 401(a) program is an annuity insurance program, can you provide guidance on what would distinguish the current ICMA product from an annuity insurance product?**

It is my opinion that the County's use of the ICMA Local 401(a) Annuity Program is lawful regardless of the program's actual investment in annuities as opposed to other financial instruments or funds. As seen in section 121.182, Florida Statutes, and analyzed in detail above, it is my opinion that the County's use of the program is valid regardless of the particular financial assets invested. The ICMA program is not an annuity contact in-and-of-itself but can be utilized to an annuity payment to beneficiaries at the date of

retirement. Section 121.182 permits the general investment of funds under a local program. Accordingly, based on the framing of this issue, no further analysis of any factors which may distinguish the 401(a) program from an insurance annuity product appears to be necessary.

I hope that this letter clarifies my opinion provided in my July 2, 2021 correspondence. If you would like to discuss further or have additional questions, please do not hesitate to contact me.

Sincerely,



Michael Mattimore