LEVIN PAPANTONIO RAFFERTY

Proctor | Buchanan | O'Brien
Barr | Mougey | P.A.

KIMBERLY LAMBERT ADAMS
KATHRYN L. AVILA
BRIAN H. BARR
MICHAEL C. BIXBY
BRANDON L. BOGLE
W. TROY BOUK
WESLEY A. BOWDEN
VIRGINIA M. BUCHANAN
JEFF R. GADDY
RACHAEL R. GILMER
BRENTON J. GOODMAN
JOSHUA R. HARRIS
S. MATTHEW KEEN
MARTIN H. LEVIN
ROBERT M. LOEHR

STEPHEN A. LUONGO
M. JUSTIN LUSKO
NEIL E. McWILLIAMS, JR.
JULIA A. METTS
PETER J. MOUGEY
DANIEL A. NIGH
TIMOTHY M. O'BRIEN
MIKE PAPANTONIO
SARA T. PAPANTONIO
CHRISTOPHER G. PAULOS
EMMIE J. PAULOS
MADELINE E. PENDLEY
A. RENEE PRESTON
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TROY A. RAFFERTY
MATTHEW D. SCHULTZ
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D.L. MIDDLEBROOKS (1926-1997)
DAVID H. LEVIN (1928-2002)
STANLEY B. LEVIN (1938-2009)
FREDRIC G. LEVIN (1937-2021)

September 29, 2021

Via e-mail to mdannheisser@dannheisserlaw.com

Matt E. Dannheisser, Esq.
Law Offices of Matt E. Dannheisser
504 N. Baylen St.
Pensacola, FL 32501

Re: Escambia County's 401(a) Program

Dear Matt:

As you know, we have been retained by the Board of County Commissioners to represent them in the ongoing dispute regarding the County's "401(a) program," the retirement program for certain county personnel. As you also know, this issue arose when Pam Childers, the Escambia County Clerk and Comptroller (hereinafter the "Clerk"), questioned the legal basis to maintain this plan, which has been in place since 1997.

As some background and general reference, Florida employees—including elected officials like the County Commissioners—have the right to participate in the Florida Retirement System, which is sponsored by the State Board of Administration. When an employee chooses this option, his or her employer is required to make a coordinated contribution into the same fund. It is the employee's right to have that money contributed to the plan on his or her behalf. Decades ago, the County established an alternative system for certain employees, which includes the Board of County Commissioners. Under this plan, rather than having the money go into the state's pool, contributions are made under a contract dating back to the late 1990s with the International City/County Management Association Retirement Corporation, or "ICMA." ICMA's whole function has been to help local governments manage such plans, and it is a large and well-known company in its space. (Recently, ICMA changed its trade name to MissionSquare but ICMA remains its legal name.)

Escambia County contributes the exact same amount of money to ICMA plans as it would if participants had chosen the Florida Retirement System. The County's program is known as a "401(a) program" because Section 401 of the Internal Revenue Code

authorizes this arrangement. (Section 401 also authorizes the better-known "401(k)" plans.)

It is clear that the County's 401(a) program is fully authorized by state and federal law. It was created in 1997, decades before the current Board was elected, and has stood unchallenged until now. This program is just like retirement programs maintained by other Florida counties. The Clerk has been a part of administering it for years. The program is legally sound, and we request that the Clerk withdraw her objections and continue making contributions under the contract as required in her capacity as Clerk and Comptroller.

The Clerk's most recent statement on this program is contained in the September 3, 2021 letter from Codey Leigh (attached for your reference). We strongly disagree with the Clerk's position. The program rests on a firm legal basis, including but not limited to:

- First, Escambia County is a home-rule county, which means that under the Florida Constitution, it has broad powers to act within its good judgment, not inconsistent with state law. Fla. Const. art. VIII, section 1(f). So long as the Legislature has not taken a subject away from the County's scope of authority, the County retains the right to act on that subject. *See Speer v. Olsen*, 367 So. 2d 207 (Fla. 1978). So we begin with the presumption that the program is authorized because it isn't forbidden.

- Second, there is no statute taking this subject out of the County's scope of authority or restricting the County's authority to maintain a supplemental retirement program like its 401(a) program.

- The only statute of any plausible relevance is Section 121.182, Fla. Stat., which the Clerk raised in the September 3 letter. But in fact, Section 121.182 **expressly authorizes** the County's 401(a) program. The law states: "Municipalities 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." That is what the County has been doing since its inception in 1997.

- The Clerk does not challenge the fact that the plan also complies with federal law, in that the distributions will ultimately be made in accordance with Section 401(a) of the Internal Revenue Code.

Our opinion is also consistent with the July 21, 2021 opinion letter by an outside law firm, Allen Norton & Blue, which analyzed the same issues and came to the same conclusion. I am attaching that letter too.

The Clerk argues that a different part of Section 121.182 ties the County's hands, making its 401(a) plan improper. This is simply incorrect. She cites irrelevant parts of that law which authorize local governments to "purchase retirement annuities [] for county personnel 50 years of age or older with 25 or more years of creditable service." That has nothing to do with the other part of the statute—which expressly authorizes supplemental retirement programs for county personnel. The express authority to have a 401(a) plan is

not canceled out by the irrelevant part the Clerk cites. Indeed it's not unusual for statutes to do multiple things or even address multiple subjects.

Moreover, the Clerk has found the 401(a) program authorized by law for years. The Clerk has been responsible for making contribution payments to the County's outside 401(a) administrator for years. Why the Clerk has recently changed her opinion about the legality of her own past actions is not something we will address in this letter. But it is worth noting that she made such payments in the past because she was authorized by law to make them. However, to the extent the Clerk continues to maintain her past or future payments were unauthorized, it is worth noting that the Clerk would be personally liable if she made any unauthorized payments in the past. *See* Section 129.09, Fla. Stat. (which provides that the Clerk "shall be personally liable" for unauthorized charges paid).

The Clerk's letter generally references Florida Attorney General opinions that supposedly support the Clerk's view, but the Clerk makes no citation to any specific opinion letter. So, we did our own search. There is nothing we could find in the Florida Attorney General Advisory Legal Opinion database on Section 121.182, or touching on the legality of having a contract with ICMA. In our view, the fact that no one has ever made an issue of such a plan, and that no such complaint has ever crossed the Attorney General's desk, is telling. The Attorney General hasn't opined on this because the statute is clear and the plan is straightforward.

Precedent from other Florida jurisdictions supports the existence of Escambia County's program; Escambia County isn't alone here. Numerous other Florida counties and municipalities have similar 401(a) programs in which elected officials are eligible to participate. These programs are also administered by ICMA or other management companies such as Nationwide. The Clerk has not identified any legal challenges to these existing programs.

Once again, it's important to note that the County's plan does not cost Escambia County or its taxpayers a dime more than the default option, the Florida Retirement System. Whether a Commissioner selects the County's plan or the Florida Retirement System, the County pays exactly the same amount out as a contribution. That's because the County properly has set its contribution level for the 401(a) plan to be *identical* to what it would otherwise pay the FRS. So this is not a case where the 401(a) plan creates a special pool of funds or an additional burden on taxpayers. Moreover, with many FRS scenarios, there is a lifetime annuity option—which is entirely permissible for personnel to select—but that option can cost taxpayers significantly *more* than the 401(a) plan. That's because it can require lifetime annuity payments to both a commissioner *and* their surviving spouse. The County's 401(a) plan doesn't give participants that option. The County's 401(a) program is a more efficient private option that avoids dangers of uncertain future liability and funding while keeping control and oversight of the retirement contributions right here in Escambia County—as opposed to sending them to Tallahassee.

Based on this analysis, we request the Clerk to drop any remaining objections and continue making contributions as required in her capacity as Clerk and Comptroller.

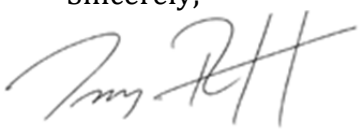
The Clerk suggested that if this dispute isn't resolved, we might turn to chapter 164, Fla. Stat., which creates a process for certain government disputes. However, this statute does not apply. The Clerk is not a covered entity under the language of the statute as the Clerk is not a local government, a city, a county, or a governing body. This *is* supported by Florida Attorney General Advisory Legal Opinions. *See, e.g.*, AGO 91-90, Settlement of Governmental Disputes (Nov. 27, 1991). Even if the Clerk were covered, Section 164.1041(2) states that if "significant legal rights" would be compromised by the procedure, then covered entities can proceed to court without engaging in this mediation procedure.

Making payments under a contract entered into by the County Commissioners is a ministerial act. The Clerk does not possess the authority to pick and choose which contracts she will uphold. As an example, the Clerk could not legally refuse to make payments under a road construction contract just because the Clerk did not like the contractor or the terms of the contract.

The Board has every right to proceed with litigation now. We are prepared to file a lawsuit if necessary. The Board would prefer to avoid that, however. On behalf of the Commissioners, we remain willing to sit down with the Clerk's legal team rather than engage in unnecessary, costly, and protracted litigation.

If the Clerk is willing to drop her objections to the 401(a) plan or is inclined to have discussions with us, we would request the favor of a reply within one week. If not, we are prepared to resolve this matter in court.

Sincerely,



Troy Rafferty

cc: Codey Leigh and Alison Rogers (via email with enclosures)

Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

September 3, 2021
(delivered via hand delivery)

Clerk Pam Childers
190 W. Government Street
Pensacola, Florida 32502

Re: Propriety of Escambia County Contributions to a Private Retirement Plan for the Benefit of Three County Commissioners

Clerk Childers:

This correspondence addresses the propriety of contributions to a private[1] retirement plan for the benefit of three County Commissioners.

It is the duty of the Escambia County Clerk of the Circuit Court and Comptroller (the "Clerk") to determine the legality of expenditures before dispensing public funds. In this regard, it has come to my attention that Escambia County's prospective contributions to the ICMA Plan[2] for the benefit of Commissioner Barry, Commissioner May, and Commissioner Bender appear to be unauthorized under Florida law. If so, the Clerk is prohibited from signing warrants for such contributions. I suggest the Clerk seek the County's input by providing a brief opportunity to the County to demonstrate, through their counsel, that my reasoning as explained below is incorrect and the warrants for the retirement contributions should be approved.

Art. II, Section 5(c) of the Florida Constitution provides that the compensation and method of payment of county officers *"shall by fixed by law."* In compliance with that provision, the Legislature enacted Florida Statutes Ch. 145 with the intent of establishing by general law uniform compensation of county commissioners, amongst others. The Legislature determined that a uniform law was needed to replace the haphazard, preferential, inequitable, and probably unconstitutional local law methods of paying elected county officers.[3]

Section 145.131(2) establishes that the compensation of Escambia County Commissioners[4] shall be the subject of general law only. "Compensation" would include remuneration and benefits received in return for services rendered. The Florida Attorney General has long opined that a county commissioner's compensation, including sums contributed by a county for retirement benefits, must be authorized by general law. Thus, for the County's contributions to the ICMA Plan for the three commissioners to be a valid County expenditure, it would appear the contributions must be expressly authorized by Florida general law.

Despite the fact that the County's ICMA Plan allows elected officials to participate, my research has failed to identify any express statutory authorization for the County's contributions to the private ICMA Plan for the three Commissioners.[5] Without express statutory authorization, the contributions are not authorized by

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[1] As opposed to the state-run Florida Retirement System.

[2] *The term "ICMA Plan" refers collectively to (1) the ICMA Retirement Corporation Governmental Money Purchase Plan & Trust; and (2) the agreement between Escambia County and ICMA-RC entitled "ICMA Retirement Corporation Money Purchase Plan & Trust Adoption Agreement."*

[3] *Fla. Stat, Sec. 145.011(2) (2021).*

[4] *That is, an official whose salary is fixed by Ch. 145.*

[5] *In contrast, County contributions on behalf of the three commissioners to the Florida Retirement System are expressly authorized and the three commissioners would have the option of rejoining the FRS.*

law and cannot be paid. I suggest the County, through counsel, be provided a brief opportunity to identify any statutory authority that expressly allows the contributions.

The County obtained an opinion of legal counsel[6] (the "Opinion") suggesting that the County's home rule power under Art. VIII, Sec. 1(f), Fla. Const., affords authority for the County to make the subject contributions to the ICMA Plan. That home rule authority is contingent upon the act not having been preempted by general law. Yet, as observed above, Fla. Stat. Sec. 145.131(2) indeed preempts permissible compensation to those specifically authorized by general law. I suggest the Clerk solicit the County's input in reconciling the apparent inconsistency between the asserted home rule power authorization and the need for specific statutory authorization for the subject ICMA contributions.

The Opinion also argues that the ICMA Plan lives *"...predominantly by section 121.182, Florida Statutes' plain language."* However, that statute authorizes counties to:

a) purchase retirement ***annuities,***
b) for county personnel ***50 years of age or older with 25 or more years of creditable service***.

The contributions to the ICMA Plan for the three commissioners do not appear to be for the purchase of an annuity. Further, it does not appear that any of the three commissioners meet the requirement of 25 years of creditable service.

The Opinion also contends that the phrase in 121.182 which provides that a county is *"authorized to invest funds, purchase annuities, or provide local supplemental retirement program"* validates contributions to the ICMA Plan for the three commissioners. However, that authorization is for the *"...purposes of providing* ***annuities*** *for city or county personnel."* Moreover, the annuities contemplated thereby are those mentioned in the preceding sentences (i.e., annuities for early retirement and for out-of-state service). The contributions to the ICMA Plan for the three commissioners do not appear to be "providing annuities." Yet, even if they did so, none of the three commissioners meet the "early retirement" or "out-of-state service" requirement. Thus, it does not appear that 121.182 provides the required express authorization for the County's contributions to the private ICMA Plan.

It is my opinion that response hereto should be provided as soon as possible, but certainly within the next thirty days. If the County, through counsel, is unable to provide the information sought herein, or otherwise declines to do so, then the Clerk should cease contributions to the private retirement plan for the Escambia County Commissioners. If the County addresses the foundational issues herein then there are other substantial considerations that must also be addressed regarding the ICMA Plan.

In lieu of litigation, this matter may be resolved through the dispute resolution process contemplated in Florida Statute Ch. 164. As a constitutional officer the provisions of Ch. 164 may not apply, but such dispute resolution process may be in the best interest of all.

Sincerely,

Codey Leigh
General Counsel

Cc: Matt Dannheisser

[6] *Allen, Norton & Blue law firm letters to Alison Rogers dated July 2, 2021, and July 21, 2021.*

ALLEN NORTON & BLUE
PROFESSIONAL ASSOCIATION

906 North Monroe Street • Tallahassee, Florida 32303
Telephone 850-561-3503 • Facsimile 850-561-0332

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