



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

December 3, 2021

Commissioner Jeff Bergosh
Chairman of the Escambia County
Board of County Commissioners
221 Palafox Place
Pensacola, Florida 32502

Re: Propriety of Escambia County Contributions to a Private Retirement Plan
for the Benefit of Three County Commissioners (Barry, May, & Bender)

Dear Chairman Bergosh:

As you are aware, as Clerk of the Circuit Court it is my duty to determine the propriety of proposed expenditures before dispensing public funds. I have previously expressed concern whether Escambia County contributions to a private retirement plan¹ for the benefit of Commissioners Barry, May, and Bender are authorized by law. If the contributions are not authorized by law, then I am prohibited from signing checks, wires, money transfers, or warrants for such purposes.

My attorneys have carefully researched the issue and provided their opinions. In efforts to make certain that the County's positions on the matter are fully considered, please recall that on Sept. 3, 2021, I sent you a letter which reiterated my concern, forwarded a copy of a memorandum from my general counsel, and asked that the County provide its input and responses to the positions raised in Mr. Leigh's memo. I wanted to be assured that before deciding this issue, the County was afforded full and complete opportunity to respond and demonstrate any error in our reasoning.

In sum, my attorneys opined that County contributions to the ICMA Plan² must be expressly authorized by general law. 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.

¹ The term "private retirement plan" refers to a retirement plan that is not sponsored by the Florida Retirement System.

² The term "ICMA Plan" refers collectively to (1) the "ICMA Retirement Corporation Government Money Purchase Plan & Trust (Plan Number 109606)."; and (2) the agreement between Escambia County and ICMA-RC entitled "ICMA Retirement Corporation Money Purchase Plan & Trust Adoption Agreement."

Section 145.131(2) establishes that the compensation of county commissioners must be the subject of "*general law only*." Thus, for the County's contributions to the ICMA Plan for the three Commissioners to be a valid County expenditure, it would appear that the contributions must be expressly authorized by Florida general law. Yet, my attorneys were unable to identify any express statutory authorization for those contributions.

We asked that the County please identify any statutory authority that expressly allows the contributions. I wanted to be certain that before making a final decision on the issues, the County's be given complete opportunity to provide supporting legal authority.

Your attorney provided a letter dated Sept. 29, 2021, in which he essentially made three assertions.

- The amount of County contributions to the ICMA Plan are the same as the amount that the contributions would have been if the three Commissioners had chosen to remain participants in the Florida Retirement System.
- As a home-rule county, Escambia County has broad powers to act within its good judgment, not inconsistent with state law. 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.
- A particular sentence in Florida Statute Section 121.182 expressly authorizes the County's 401(a) program. That sentence 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.*"

I do not find your attorney's assertions to be meritorious. First, I do not agree that the amount of contributions to the ICMA Plan for specific benefit of Commissioners Barry, May, and Bender would have been the same as the amounts that would have been contributed on their behalf to the applicable FRS plan. The County's approach contributes an amount equal to 51.42% of the elected officials salary to the ICMA Plan for the three Commissioners (Barry, May, and Bender). Conversely, the employer contribution as required to the FRS Investment Plan is a fraction of that amount equaling a personal retirement benefit of only 8.34%.

Further, when an elected official participates in the FRS, the County pays an unfunded actuarial liability ("UAL") component equal to 39.42%. The purpose of the UAL is to keep FRS financially sound and, the amount paid, also reduces the net pension liability reported in the County's Comprehensive Annual Financial Report. Paying the UAL component directly to the elected official's ICMA account for their private retirement benefit diverts those county funds away from FRS where they would be used for the public purpose of paying current and future retirement payments to members of FRS such as teachers, custodial workers, general employees, and the like.

Regardless, it is my responsibility to apply the law as enacted by the Legislature. Even if the amount of contribution would be the same under either retirement plan, it is not within my

authority to simply pick and choose which laws to enforce and which to ignore on the basis that the amount of payment would have been the same either way.

Second, reliance on the County's implied home rule powers is at cross purposes with the express dictates of Art. II, Section 5(c) of the Florida Constitution (that the compensation of county officers "*shall be fixed by law*"), Florida Statute Section 145.131(2) (that the compensation of county commissioners must be the subject of "*general law only*") and Florida Statute Section 145.17 (that the compensation provided in chapter 145 shall be the "*sole and exclusive compensation*" for county commissioners).

Third, taking one sentence from Florida Statute Section 121.182 and considering it in a vacuum without the context of the entire statute is misguided. The entire statute provides:

Municipalities and counties are authorized to purchase annuities for all municipal and county personnel with 25 or more years of creditable service who have reached age 50 and have applied for retirement under the Florida Retirement System. No such annuity shall provide for more than the total difference in retirement income between the retirement benefit based on average monthly compensation and creditable service as of the member's early retirement date and the early retirement benefit. Municipalities and counties may also purchase annuities for members of the Florida Retirement System who have out-of-state service in another state or country which is documented as valid by the appropriate city or county. Such annuities may be based on no more than 5 years of out-of-state service and may equal, but not exceed, the benefits that would be payable under the Florida Retirement System if credit for out-of-state service was authorized under that system. 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. All retirement annuities shall comply with s. 14, Art. X of the State Constitution.

Read in the context of the entire statute, it is clear that the sentence relied-upon by your attorneys applies:

- To purchases of annuities for; and
- Personnel with:
 - At least 25 years of service, and
 - Who have reached age 50, and
 - Have applied for retirement under the FRS; or
- Current members of the FRS who have out-of-state service; and
- For purposes of providing annuities for county personnel.

Clearly, none of those circumstances apply in this instance. The ICMA Plan is a defined benefit plan where upon retirement the participants have access to whatever amounts are in their accounts. That is an investment plan, not an annuity. Moreover, none of the three Commissioners have 25 years of service with the County, nor have any of them applied for retirement under the FRS.

Even if it were appropriate to take the one sentence without applying the context of the entire paragraph, reliance thereupon is nonetheless misguided. Although the first portion of the sentence allows counties to "provide local supplemental retirement programs" for county

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personnel, it may do so ONLY “for purposes of providing annuities.” The ICMA Plan is a defined contribution plan and does not exist for the purpose of providing annuities..

Having explained my office’s legal concerns, afforded the County and its attorneys opportunity to provide input and response to those legal concerns, and now having carefully evaluated all input and response provided by the County, it is my position that continued payments to the ICMA Plan for the benefit of the three Commissioners is contrary to the requirements of Florida Statutes Ch. 145 and the Florida Constitution.

The Clerk, as county auditor, is prohibited from paying county funds not authorized by law. Likewise, a county commissioner may not knowingly vote to incur an expenditure that is not authorized by law or ordinance. The Clerk’s pre-payment audit authority and duty to determine the legality of an expenditure exists even though an expenditure is authorized by the Board of County Commissioners. Both functions together serve the important governmental objective of ensuring public funds are spent lawfully and for a public purpose. As it is my responsibility to refuse County payments not supported by law, please be advised that effective the first payday in January 2022, I will no longer approve or process contributions to the ICMA Plan for Commissioners Barry, Bender, and May.

However, it is my understanding that as elected officials, the three Commissioners may rejoin FRS upon written request to the Department of Management Services. I am providing advanced notice so that each County Commissioner will have sufficient time to communicate with Department regarding such option.

Sincerely,



Pam Childers
Clerk of the Circuit Court and Comptroller
First Judicial Circuit, Escambia County