

City of Coral Gables City Commission Meeting
Agenda Item E-1
January 28, 2015
City Commission Chambers
405 Biltmore Way, Coral Gables, FL

City Commission

Mayor Jim Cason

Vice Mayor William H. Kerdyk, Jr.

Commissioner Pat Keon

Commissioner Vince Lago

Commissioner Frank Quesada

City Staff

City Manager, Cathy Swanson-Rivenbark

Acting City Manager, Carmen Olazabal (For this item only)

City Attorney, Craig E. Leen

City Clerk, Walter J. Foeman

Deputy City Clerk, Billy Urquia

Public Speaker(s)

Kathy Phillips

Agenda Item E-1 [Start: 9:15:14 a.m.]

An Ordinance amending Chapter 50 of the Code of the City of Coral Gables, entitled "Pensions", amending Section 50-230, Normal Retirement Income; and providing for repealer, codification and an effective date. (This ordinance does not modify pension benefits. It only serves to clarify the existing language to make it consistent with Florida Statutes, City Attorney interpretation and current practices).

Mayor Cason: We'll move onto the Public Hearings, Agenda Item E-1, this is an Ordinance on First Reading relating to Pensions amending Section 50-230, Normal Retirement Income. Madam City Manager.

City Manager Swanson-Rivenbark: Mr. Mayor, I'm going to ask Carmen to step up, she is going to be my Acting in this discussion, because I recused myself from this matter.

Mayor Cason: OK. Do we have any speaker cards?

City Clerk Foeman: Yes, we have one Mr. Mayor.

City Attorney Leen: Madam City Manager, could you read the item, the title?

Acting City Manager Olazabal: Sure. E-1 is An Ordinance amending Chapter 50 of the Code of the City of Coral Gables, entitled “Pensions”, amending Section 50-230, Normal Retirement Income; and providing for repealer, codification and an effective date.

City Attorney Leen: That is the title Mr. Mayor, but in addition, we have put that the Ordinance does not modify pension benefits and only serves to clarify the existing language to make it consistent with Florida Statutes, the City Attorney interpretation and current practices. If it's OK Mr. Mayor, I was going to make a brief statement and it's also a public hearing item. I know that Kathy Phillips is here to speak as well. So just to begin: This is laid out in the history, but I just wanted to focus on the main points; and the main point is that state law as it exist today indicates that you cannot fund an additional benefit and we believe that the COLA is an additional benefit, it's a contingent benefit, by definition the way it's written, it's a contingent benefit, it has not been prefunded. State Law indicates that you cannot fund an additional benefit like that out of actuarial experience, if there is a deficit in actuarial experience, if it is a negative actuarial experience. We have, the City has a negative actuarial experience over \$100 million relating to this proposed benefit. So the issue has been that – and this has been now on three different occasions, there is a contingent benefit which says that if the investment returns of the pension exceed a certain percentage that a COLA is provided to all of the retirees, that's what it says. In 2013, I issued an opinion along with Jim Linn, who agreed with the opinion, that said that well, even if that's triggered, this contingent COLA benefit, even in those circumstances the City cannot pay it based on state law because it would have to pay that in net actuarial experience, and the actuarial experience is negative. The Commission in a 5-0 vote at that time, I believe it was in the fall, approximately of 2013, voted to not provide this benefit, and they did it both based on the City Attorney's interpretation and a letter that we received from the Division of Retirement, which agreed with the interpretation given by the City Attorney, which was me, and they basically said the same thing, that you cannot fund a COLA benefit out of net actuarial experience. The letter from the State is attached to the Agenda Item, just to refresh your recollection and in addition, in October 2013, there is an attachment. I issued a City Attorney interpretation based both on my opinion and also based on the Division of Retirement's letter, which lays out the issue that's before you today. I explained, based both on our Code and on state law how this benefit cannot be paid unless there is a positive actuarial experience; and if you read paragraph 6, and I will read it into the record just to make clear what I believe we are

doing today, and what we are asking you to do is it says, in summary Section 50-23(c) of the City Code only requires payment of an additional COLA benefit, if the terms and condition set forth in that section and the provisions of Section 112.61, Florida Statutes are met. In particular, an additional COLA benefit is required, if the market rate of return on the assets of the trust fund is greater than or equal to ten percent the previous fiscal year, and the present value of the additional COLA benefit does not exceed the net actuarial experience in the retirement system. In determining whether to provide an additional COLA benefit under Section 50-23(c) the City's Retirement Board must determine whether both sets of conditions are met. This was issued pursuant to 2-201(e)(8) of the City Code, which allows the City Attorney to issue interpretations of the Code or the Charter or the Zoning Code on behalf of the City. So in my view when this was issued, and this was based on a Commission decision that had preceded it. I believe that this is as binding as it can be for a City Attorney opinion, because both its based on a City Commission decision, there is a Division of Retirement letter and then there is this binding City Attorney interpretation. At that time I issued this, and at the time of the Commission's decision there was no unfair labor practice charge made, because this became the City's practice because the City had to follow this opinion. So time past and the COLA benefit was triggered again according to the ordinance, but according to state law, so it was in this middle area, where again there was an over ten percent return, but there was still a negative net actuarial experience. So this matter came before the Pension Board, and the Pension Board agreed to stay the matter, but there was a debate on the Pension Board about whether or not they should follow the City Attorney's opinion and the Commission's decision. This happened again very recently and you may recall, but it looked like the COLA benefit under the ordinance, but not state law again, but under the ordinance may have been triggered again very recently and it ended up not being triggered, it was very close. But the issue came before the Pension Board again and once again there was a debate and the same debate happened, and here was the concern. My view is that this is binding and the City Commission has made a decision which is being applied, so it was my view that we should be very transparent and simply change the Code to reflect what is in existence, by change I just mean change the words, because to me it's a clarification. It's not changing any substantive benefits, because already state law, let me give you the exact clause, 112.61 says expressly that this provision that we are talking about, the actuarial experience provision of state law, it says that all provisions in this section to the extent there is a conflict with the City Code with a municipal ordinance, it supersedes and is otherwise read into the ordinance, so in my mind that's very clear. All of those provisions of state law are read into our ordinance so they are part of our ordinance already by operation of law. So all we are doing today, in my opinion, is we are making express, we are making express what is already existing by operation of law. So all we are doing is we are revising the Code to reflect what it already says by operation of law, so I believe it is a very positive thing to do, because anyone who comes into the City can read the Code then and realize what it says, and they don't have to go to the state statute and look at that as well and read the City Attorney opinion, it's very clear for

everyone. Now I know that – and I’m not going – I’m going to let Kathy Phillips present her case. I want you to know I understand what they are saying and I would like an opportunity to speak afterwards. Their concern that this is basically changing a benefit. I will let her explain that. I just want you to know, I did think about this a lot before presenting this item. I don’t agree. I believe that we are simply revising the Code as a responsible City would do to reflect state law, because we are applying it this way and having been applying it this way for several years, since this issue has come up, and I think that the Code should reflect the position that the City has taken, which is binding in my opinion, and which is the way that we have proceeded. So with that though, if it’s OK Mr. Mayor, I think we should hear from Ms. Phillips.

Mayor Cason: Ms. Phillips.

Ms. Phillips: Thank you Mr. Mayor. Good morning everyone, thank you Craig. You’ve heard this issue before from Ron Cohen, when this issue first came up a couple of years ago, and Craig gave the same opinion that he is giving to you today, and I don’t think there is anything new, different, or exciting about what I’m going to tell you, but we do have a difference of interpretation of the ordinance and what it requires. We do not believe that the COLA that was written into this ordinance many years ago is an additional benefit, and that’s where we differ on the interpretation of the application of the statute that Craig read to you. I agree with him, that’s the law, what we disagree with him is whether that law applies to our COLA and our ordinance that was established years ago. We do not believe it’s an additional benefit to which that ordinance of that statute applies. So I don’t want to – I’m not going to you know reinstate with you. As you know, there is some pending litigation and we’re happy to let the court make a decision on that, but we would urge you not to take further action in what we believe is a unilateral change in the ordinance, because we believe it to be unilateral change and a change to the benefits because now you are applying or you intend to apply this statute to any time the Pension Board decides to, by virtue of the formula that existed in the ordinance itself, we are entitled to a COLA. We don’t agree that the statute applies because it is not a new additional benefit. So, I don’t think we are going to resolve that here, but what we would ask of you is to defer making a decision on this ordinance as being presented to you, because we believe that creates yet another issue for us, because although, as Craig presented a couple of years ago, you decided you were going to apply that statute, even though you weren’t incorporating it into your ordinance. We have the pending litigation. If you adopt this ordinance we think you’ve created two more problems – one, we are going to probably supplement the litigation to bring it to the court to address it in that manner. Additionally, we believe you made a unilateral change in active employee terms and conditions, and that creates another unfair labor practice issue, which I wrote to Craig about and which adds a whole other dimension for active employees. So we would urge you to just defer taking action on this ordinance, allow the parties to either mediate this matter, which is something that’s on the table which we are looking at doing sooner rather

than later, and allow that process to go forward or allow the courts to make a decision on the application of the statute to our longstanding COLA benefit. I also would like to, if you would indulge me, I have a statement from the two plaintiffs in the litigation who are retirees, I've been asked to read a statement from them, if you would allow that. This is a statement of Robert Murhee and Daryl Blakely, who are named plaintiffs in a lawsuit seeking to represent a class of retirees against the City. This is a lawsuit in which we allege you cheated the retirees out of their COLA. The retirees have appeared here before you on their COLA previously to no avail. Frankly, we hoped that you would see this matter differently than you have in the past; we are not expecting you to do so. This City, it's Commission, management, and City Attorney has breached a trust...with retirees of the City, who have labored with a long and loyal service to this City. They have selflessly run into burning buildings when others were running out. They've been shot at; they've gone into backyards of many citizens in early morning hours while the occupants of those houses have quaked in fear. They have been lifeguards, the clerical help, the planners and other general employees who have risked their lives so selflessly during such times as Hurricane Andrew and others. They did all of this with the promise that they would receive a certain pension benefit when they retired and that they would share in the improvements attained by the plan. Now you are attempting to take it all away. Make no mistake about how serious what you have done and are attempting to do is both to retirees and to the taxpayers of the City. You've been furnished with an ordinance which states in its fourth whereas clause that quote, "Wherefore the Division of Retirement has issued a letter indicating that the Pension COLA contained in Section 50-23(c) of the initial Code cannot be paid unless a net actuarial experience accumulated from all sources of gains and losses is sufficient to fund the benefit" (end quote). That is not what the letter says, rather it says; quote "The Division finds that since the net actuarial experience of the Coral Gables Retirement Plan accumulated from all sources of gains and losses is negative pursuant to Section 112.61, Florida Statutes. The cost of this benefit adjustment could not be paid from actuarial experience" (end quote). There is a big difference between what you've been told and what the letter says. The Department of Management Services has emphatically not told you that this benefit adjustment cannot be paid or that can only be paid where there is a net actuarial experience gain. The benefit is a promised benefit and has to be paid. You have this matter backwards. You are saying that since it hasn't been funded we can't pay it, instead of saying, we have to pay it and so we have to fund it. You are preparing to do just what you cannot do. You are transferring this payment to future generations of taxpayers. If we win in the lawsuit and we expect to, and the benefit has to be paid, you'll be transferring the cost to future generations of taxpayers who will have to pay for it because of your mistaken and misguided approach to this problem. We urge you to defeat this ordinance. We suggest that you at least put the cost of this benefit into the Pension Plan regardless of how the litigation turns out. If you do not have to pay, the benefit the money will be fully invested getting the highest rate of return the City gets in all its investments. If you do have to pay the benefit then the money will be there relieving future generations of taxpayers. In closing, I've

been in discussions with Craig and we've talked about a number of ways to reach a global resolution and one of those things is we are talking about having a mediation and perhaps making that mediation a public event, so that all parties involved, all the stakeholders, including the unions and the active employees will be able to participate in helping to come up with some resolution that will resolve both the unfair labor practice issues, the current retiree issues and the future retiree issues. So with that we look forward to coming to some kind of global agreement and we would hope that we don't add more fuel to the fire by passing the ordinance that you are looking at today. Thank you.

Mayor Cason: Thank you.

City Attorney Leen: Mayor if I may. Here's the issue. I'm in favor generally of collective bargaining; I think we all are, it's a right. The problem here is, in my view it doesn't apply, here's why. I'll just give you the practical issue. Let's say we collectively bargain this, the City would go on and say, this already applies by operation of law, there is nothing to bargain. The unions would ask for some benefit in return for giving this up from their perspective. Our position would remain, well no, we can't give you consideration because it already exists, there is no public purpose to doing that, and in addition, that would basically undermine our entire lawsuit because we are basically saying that we do have to give you something in order to change the Code, because they'll be looking at that as, well you are actually changing our benefits, but we've taken a formal public position based on a state statute that we are not changing the benefits, there has been a City Attorney interpretation issue and we have a Division of Retirement letter that supports it. I'll address what Ms. Phillips said about that. So to me that's not – if anything that I'm concerned, if we go into collective bargaining, if we believe that that applies and we go in and we say that, that may draw an unfair labor practice claim, because then essentially we are saying yes, this is subject to bargaining but we will offer you nothing; and so I think that based on the fact that we believe that this is the law, so, I'm concerned about that. Now does that mean we can't necessarily look at this issue in terms of – if the unions and the retirees were to accept that this was the law that, that the Commission had discretion to grant a COLA or perhaps to negotiate with them to provide that sort of benefit. We've always said that the City could do that and I've raised that with the Pension Board on multiple occasions, and I've said to the Pension Board, you can always recommend to the Commission that a COLA be paid or you can recommend some solution to this problem, and they haven't done it, because I think that there is a division on the Pension Board about whether they should do something that's discretionary, when there is at least an argument being made that is something that's binding. That's just my own view of the issue because they've never done it, but we have always taken the position we'd be happy to talk about providing that benefit, but there has to be an acceptance to go into a collective bargaining session and if we take the position, these are public – these collective bargaining sessions are public and if we go in there and say, oh yes, we want to change

the law to change the Code, to no longer provide this benefit, if we took that position which essentially their position that this benefit is something that has to be paid, we would be basically making an admission that we don't agree with the City Attorney's interpretation, that the City Commission's prior decision was incorrect, and I don't believe it is. I think that, that's what state law says, so we are not trying to – I just want to – it's a logical extension of the position that the City has taken and we talked about this today. I understand why Ms. Phillips is here, because the logical extension of their position is what she says. So this is going to be an issue that will have to be decided by a court or have to be decided by mediation, some sort of agreed mediation. I have offered to allow the unions, subject to the Commission's approval, but I figure you'll be OK with this, to participate in the mediation and we can even make it a public mediation, if they prefer or however you want to do that. I'm happy -- I would recommend if you pass this on First Reading, that doesn't enact it. There is still going to be a Second Reading and I'm happy to meet with Ms. Phillips and try to work this issue out. I want to say one other thing about the statement. Where they said there was a breach of trust by the Commission and the City Attorney. As the City Commission's legal representative and on my own behalf, I would say I do not view it that way. I want you to understand that we were basing these both on the advice of outside counsel and on my view of the statute, which was in good faith. I read the statute, that's what it says; we are dealing with a tremendous issue. We have a deficit in our pension of over \$200 million and we've been told that the net actuarial experience as to this benefit is over \$100 million. So I was asked, is this something that we have to pay or is it something that's in our discretion?- and that we would have to fund essentially. When I read the statute, to me it was clear that we could not fund this at a net actuarial experience. We could grant a discretionary COLA, but there was never a request to do so, because the view of the retirees was no it's mandated by law, so we were never asked to do so, there were never any negotiations about that. I've always said that, that could be done, but I want to be clear, this was based on the way the state law was written and as the legal officer, the Chief Legal Officer of the City, all I can do is give my honest opinion of what it says. I have to be a neutral officer and the Commission accepted my opinion. But I will say, they said please check with the Division of Retirement and I did, and I sent a letter to them and they came with a letter. Now I read the letter differently than you. To me what the letter says is that we cannot pay this COLA benefit the way it is drafted because it's funded by net actuarial experience. Now could the City change the law?- well yes – the City could, but the City has to consider in whether to decide to change the law or not, the fact that we have over \$200 million deficit in the pension. If it's a discretionary issue, they have to consider that, in my opinion, in determining whether to grant it or not, and that's a public trust; they have a trust to, I'm not going to speak for the Commission, I'm sure they are going to speak for themselves, but in my view of it, it's a very difficult issue because, yes there is a duty, I'm not saying a legal duty, but the Commission is concerned about the employees, but they also have to be concerned about the pension system and that it will work for years to come, so that people can benefit from it and so that it benefits the City as-a-whole, the citizens, the employees, and so that it's on sound

actuarial footing. So I believe, in my opinion, that the Commission has acted appropriately here, but I've spoken a lot and I would reopen it....

Ms. Phillips: I hear a candidate over there, I don't know about you.

City Attorney Leen: No, no, no. I'm not a candidate for anything. The breach of the trust, I feel that I had to respond to, because I don't view it as a breach of trust, I'm just trying to do my job.

Commissioner Lago: Craig, I don't think anyone is, at least here on the Commission, which you work for so well, I don't think anyone here on the Commission is doubting you...to the City and where you stand in regard to many issues. You know you have our support 110 percent.

Ms. Phillips: And please don't view that as our position that you are taking it, you made your opinion in bad faith. I understand that you believe your position and I hope you understand you believe that ours is correct. And you can continue taking your position as you have, as he points out you have without enacting this ordinance to then which in my opinion, creates yet another problem that we then have to resolve, which is the unilateral change issue, the unfair labor practice aspect.

Mayor Cason: Do we have anymore speaker cards?

City Clerk Foeman: No Mr. Mayor.

Mayor Cason: Then we'll close the public hearing portion – discussion?

Commissioner Keon: I think that when this issue first came up and we asked for the opinion from Tallahassee and we received it, I thought at that time that we were going to clarify the language in our ordinance to reflect state law. So I'm surprised that it has taken as long as it has to actually do that, and now that we are here I will work on the advice of our attorney, that it's not an additional benefit and it should be very clear, and if it requires then that it go to court and a determination is made by a court then it's settled and it's over or it's mediated, but then it's answered and we won't continue to have this back and forth discussion. So I would move to support this item.

Vice Mayor Kerdyk: I'll second it.

Commissioner Lago: Excuse me Mayor; I will also be supporting this ordinance today. I think a lot of this ties into the forthcoming Sunshine Meeting that we are going to have, which is going to discuss pensions and our current situation. I think we are having that next month, Madam City

Manager, I think we are having the Pension Sunshine Meeting is coming at some point next month. I think for the first time in a long time I think this Commission is taking a really good stance in regards to getting our hands around the actual pension issue; and like I was having a conversation with you prior to this meeting. This Commission has, like our City Attorney stated, has a duty to the public and we have to be extremely careful in reference to the items that we put into law, but this is an item which currently we send about \$250 million unfunded and we are talking about tacking on another \$100 million, that is not financially prudent. You are talking about a system which could become insolvent and we are not too far from that. I don't mean to scare people, but I don't know how you feel Mayor, but we are talking about we are in the 50's in regards to our funding level. We have one of the worst funding pensions in the State of Florida, so action is required, not tomorrow, action is required today. So I think it's important that we move forward in regards to this ordinance – we are not sending a message to the employees, we have a duty to the employees, but we also have a duty to their pension in the future and we need to make sure the City is in good standing and on solid ground to be able to provide that pension in the near future.

Mayor Cason: I agree. I think it's important to clarify where we stand, clarify what state law says. We are going to have mediation and we are also going to have a court case, and if there are opportunities, perhaps recent...an agreement, but I think it's important for us to say, this is how we view it, and I go with our City Attorney, and go with the letter from the state.

Commissioner Quesada: I agree as well, but just one point of clarification. I think we should have the mediation, I don't know scheduling after we have our Pension Sunshine Meeting just so we can have additional clarification and additional discussion.

Commissioner Lago: I agree.

Commissioner Quesada: I don't know the timing of everything. We've discussed pension issues since I've been on the dais, we always learn every day when it comes to pension issues no matter how long you've been on this dais. So I'm really looking forward to that Sunshine Meeting so we can really get into some of the minutia, and I think it would be better for all the parties involved if we go through that prior to the mediation.

Mayor Cason: Anybody disagree with that?

Commissioner Keon: No – and I would hope that the union representatives and anybody that would be subject to any pension provisions would attend the meeting, so that we all are sharing the same knowledge.

Vice Mayor Kerdyk: I think I should say one thing.

City Attorney Leen: I'm sorry.

Vice Mayor Kerdyk: I just want to make sure. I'm 100 percent supportive of where we are going on this, but I do want to make sure that if anybody – I think the Commissioner was talking about our \$250 million, but I want to make sure that everybody understands that we are not even close to defaulting on any of our – I just want to clarify.

Commissioner Lago: Again, I'm not saying -- we are defaulting, we are on much better financial standing today than we were four or five years ago – incredible, but the bottom line is when you look at other cities and other municipalities that are funded in the 80 and 90 percent, we want to strive for that, we want to strive for that. So if we are talking about going in a different direction, we are talking about if we accept this COLA taking another \$100 million of an unfunded to an existing \$250 (million). To me and we have businessmen in this room here, businessmen and business women that's not prudent, doesn't make financially prudent sense to me.

Mayor Cason: Also there is another point. We have over 30 assumptions in our retirement plan and there is another one on the table which is the mortality table, which could cost another \$40 or \$50 million.

Commissioner Lago: So we are talking about getting close to the \$400 million dollar range, we are currently 52-53 percent funded. Again, the City is in very good financial position, but the issue here is the pension, not the City's financials.

Vice Mayor Kerdyk: I just want to make sure that – you've been a leader with the pension and I appreciate that very much and so I just want to make sure that nobody misinterprets it, somebody watching TV or a Herald Reporter, whatever, all of a sudden reports that we are having problems. There is no way -- \$25 million obligation or whatever the obligation is, that's not an issue, but what you are saying is if we continue to enhance that \$250 million against the \$400 million that's another issue.

Commissioner Lago: Prior to Commissioner Keon and myself being on this Commission, steps were made where we went from having, I think, \$1 million in reserves to now we have over \$30 million, and that was done with the leadership of three individuals on this Commission before Commissioner Keon and myself got here, so have \$30 million in reserves plus, I think it's like \$32 or \$31 million, that's substantial from where we were five years ago. Again, what the Vice Mayor says is 110 percent correct. We are in great financial standing, but we've got to make some decisions right now, hopefully that will put us in better standing.

Mayor Cason: We will do then, we all agree we will do the mediation after the...

City Attorney Leen: Mr. Mayor let me just tell you the status of that. I'll give you the direction that you would like. We have George Knox, he is going to be the mediator, right now the case is between a number of named plaintiffs and the City of Coral Gables. There has been a request – at some point there will be a request to certify the class. Any settlement we reach we would like it to apply to all the retirees obviously, if we were to reach a settlement. What's being asked is that, normally a mediation is done in private, what's being asked by the unions, and I'm open to it, in fact I'm in favor of it, but what's being asked by the unions is that they be able to participate in the mediation even though they are not parties, which means that the mediation, and we'll look into this, may have to be public, if there is a collective bargaining component to it, it may have to be public, it may not, we'll talk about it. But also any settlement then may also apply to the unions as well, so it may be broader. Obviously, if we are going to do that it should be after your workshop. So is it OK if I act in that way? I'll ask Mr. Knox to schedule it for after the meeting. I'll ask the retirees and unions to schedule it for after and then we'll engage in the mediation and we can then have an Executive Session.

Commissioner Quesada: Our position may not change, but I anticipate that we are going to be in a more unified state up here, and not saying we are not, because we are already unified on this, but I just think that we can get into somewhat additional detail at the Sunshine Meeting.

Mayor Cason: And options that we can pursue in the future.

Commissioner Quesada: Yes – exactly.

Mayor Cason: Alright. So do we have a motion on this?

Commissioner Keon: I motion, but I also want to make it very clear to everyone in the City who is covered under this pension is that we do truly respect and honor the commitments that have been made under collective bargaining, and it is because this particular item is viewed under the opinion of our City Attorney, in conjunction with the state that it is an additional benefit and so therefore isn't covered under the collective bargaining, and it is not our intention at all to change anything that has been agreed under bargaining that is currently owed to anyone.

Mayor Cason: So we have a motion by Commissioner Keon.

Commissioner Lago: I'll second the motion.

Mayor Cason: Commissioner Lago seconds.

City Clerk

Commissioner Lago: Yes

Commissioner Quesada: Yes

Commissioner Keon: Yes

Vice Mayor Kerdyk: Yes

Mayor Cason: Yes

(Vote: 5-0)

Assistant City Manager Olazabal: Just very quickly, the pension workshop is February 13th.

Commissioner Lago: Thank you very much.

Mayor Cason: Thank you.

[End: 9:49:21 a.m.]