



STATE OF FLORIDA
CHIEF FINANCIAL OFFICER
ALEX SINK

November 24, 2009

The Honorable Charlie Crist
Governor
The Capitol
Tallahassee, Florida 32399-0001

The Honorable Bill McCollum
Attorney General
The Capitol
Tallahassee, Florida 32399-1050

Dear Governor Crist and General McCollum:

During our Board of Trustees meeting on September 29, 2009, I shared with you my proposals to improve the oversight of the State Board of Administration (the "SBA"), and protect Floridians' retirement security. We are managing a public pension fund valued at over \$110 billion that our police officers, teachers, and state employees depend on for their financial future. Because of our fiduciary responsibility to the participants in this fund, I believe we need to strengthen our oversight of the fund by expanding the Board of Trustees to include one or more members with extensive investment experience, and one or more members who are participants in the Florida Retirement System.

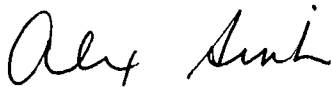
My legal staff has been researching whether the investment oversight of the pension fund is constitutionally required to be performed exclusively by the SBA acting as a Board of Trustees, which would mean that any changes to the oversight of the pension fund could only be accomplished by amending the Florida Constitution. We have concluded that the SBA's authority to supervise the pension fund derives solely from Legislative grants of power, and therefore the Florida Legislature has the authority to change the oversight of the pension fund. Amending Florida's Constitution is not required.

Because this is an issue of great public importance, I asked my General Counsel to have former Florida Supreme Court Justice Major Harding review our legal analysis. Justice Harding is a constitutional scholar, and has concurred with my lawyers' assessment that these reforms can be accomplished by changes to the statute, and do not require amending Florida's Constitution. I have enclosed a copy of his analysis for your review.

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I look forward to our continued discussion of these reforms, and hope you will join me in recommending them to the Legislature at our next SBA quarterly board meeting on December 8, 2009.

Sincerely,

A handwritten signature in black ink, appearing to read "Alex Sink". The signature is fluid and cursive, with the first name "Alex" and the last name "Sink" clearly distinguishable.

Alex Sink

cc: Ash Williams, Executive Director, State Board of Administration
Robert Konrad, Chair, Investment Advisory Council
John H. Hill Jr., Vice Chair, Investment Advisory Council
Beth McCague, Investment Advisory Council
Robert H. Gidel, Investment Advisory Council
John Jaeb, Investment Advisory Council
David J. Grain, Investment Advisory Council

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November 10, 2009

Ben Diamond, General Counsel
Florida Department of Financial Services
200 East Gaines Street
Tallahassee, FL 32399

Re: Legislature's authority to alter Pension Fund's oversight board

Dear Mr. Diamond:

You have asked me for an opinion concerning whether investment oversight of the Florida Retirement System Trust Fund (the "Pension Fund") is constitutionally required to be performed exclusively by the State Board of Administration (the "SBA"), which would mean that any change in the oversight of the Pension Fund could be accomplished only by amending the constitution. The answer is no. Nothing in the Florida Constitution requires the SBA to participate in supervision of the Pension Fund, let alone manage it exclusively. Rather, the SBA's authority to supervise the fund is derived solely from legislative grants of power in sections 121.151 and 215.44, Florida Statutes. The legislature has plenary authority to change oversight of the Pension Fund, either by divesting the SBA of its supervisory authority or by expanding the Pension Fund's oversight board to include officers or entities in addition to the members of the SBA.

Oversight of the Pension Fund is not now and has never been a constitutional duty of the SBA. Since its inception as a constitutional entity, the SBA's constitutionally-prescribed duties have been limited almost exclusively to administration of fuel tax proceeds. The SBA has been in existence as a constitutional entity since 1942, when article IX, section 16 was added to the Constitution of 1885,¹ following the 1942 general election. Article IX, section 16(b) provided for a state board of administration, to be composed of the governor, acting as chairman, along with the state treasurer and state comptroller. The constitutional SBA created by the 1942 amendment replaced an antecedent statutory board of administration, which was similarly composed of the governor, acting as president, the state comptroller, acting as secretary, and the state treasurer, acting as treasurer. § 344.12, Fla. Stat. (1941). Article IX, section 16 required that the SBA "succeed to all the power, control and authority of the statutory Board of Administration." Art. IX, § 16(b), Fla. Const. (1942). The only duties tasked to the SBA by the Constitution of 1885 related to its administration, management, and control of the proceeds of a two-cent per gallon gas tax, referred to by the Constitution of 1885 as the "Second Gas Tax,"

¹ By "Constitution of 1885," I refer to the Florida Constitution that was the product of the Constitutional Convention of 1885, which, as amended from time to time, served as the foundation for Florida government until it was replaced by our present Constitution following the Constitutional Convention of 1968.

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along with similar powers over the proceeds of county and special district bond issues relating to road and bridge projects, for bonds issued prior to July 1, 1931. *Id.*

The duties of the SBA prescribed by the Florida Constitution have remained largely unaltered since 1942, the only significant change being that its constitutional duties now relate exclusively to fuel tax administration. When the Constitution was globally revised in 1968, the only mention of the SBA in the new version was in article XII, section 9(c), a section entitled “Motor Vehicle Fuel Taxes.” Art. XII, § 9(c), Fla. Const. (1968). Significantly, the 1968 version of article XII, section 9(c), provided that the SBA, whose establishment and composition set forth in Article IX, section 16(b) of the 1885 Constitution was incorporated by reference, was to “continue[] as a body corporate *for the life of this subsection 9(c).*” Art. XII, § 9(c)(5), Fla. Const. (1968) (emphasis added). This provision suggested that the SBA could be dissolved, without constitutional amendment, once it concluded its duties relating to the fuel tax. Still today, the only duties assigned by the Constitution to the SBA are found in article XII, section 9(c), a section that remains devoted to “Motor Vehicle Fuel Taxes.”

The provision prescribing the composition of the SBA was moved to article IV, section 4, the section entitled “Cabinet,” following the 1998 general election, as part of a much larger revision relating to Cabinet reform proposed by the Constitution Revision Commission (“CRC”) and approved by the voters. The principal goals of the revision relevant to the SBA were “[to merge] cabinet offices of treasurer and comptroller into one chief financial officer” and “[to reduce] cabinet membership to chief financial officer, attorney general, [and] agriculture commissioner.” Ballot Summary, Constitutional Revision Proposition Eight (1998). Accordingly, the revision required amendment to the SBA’s composition because two of the three officers that made up the SBA would cease to exist following voter approval. *See* Comment to art. IV, § 4, Fla. Const., 1997-1998 Constitution Revision Commission Revisions 8 and 13 (“The state board of administration is comprised of the governor, the chief financial officer, and the attorney general--a change necessitated by the merging of the fiscal officers, since the state board of administration was previously comprised of the governor, comptroller and treasurer.”). The amendment had no other purpose relevant to the SBA. *See* Constitutional Revision Commission, Committee on Executive Proposal Analysis, Analysis of Committee Substitute for 159, 163 and 182 relating to Cabinet Reform (Jan. 24, 1998), at *2 (noting, in section entitled “Effect of Proposed Changes,” that “[t]he State Board of Administration, which is currently comprised of the governor, comptroller and treasurer, would be comprised of the governor, the attorney general and the chief financial officer”); *id.*, at *3 (noting, in section entitled “Effect of Committee Substitute,” that “[t]he placement of the provision which establishes the makeup of the state board of administration is moved into Article IV from the schedule (Art. XII)”). Significantly, article IV, section 4, as amended pursuant to the CRC proposal, retains the requirement that the SBA “continue as a body at least for the life of Article XII, Section 9(c),” art. IV, § 4(e), Fla. Const., which is the only other section of the Constitution that references the SBA and, as provided above, is the only section that assigns the SBA any powers and duties, *see* art. XII, § 9(c)(5), Fla. Const.

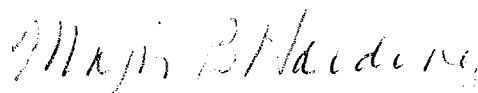
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As this discussion makes clear, the Florida Constitution has never required the SBA to perform any functions related to the Pension Fund. The sources of the SBA's supervisory authority over the Pension Fund are statutory only. Section 215.44(1), Florida Statutes, provides, in relevant part, that "the Board of Administration . . . composed of the Governor as chair, the Chief Financial Officer, and the Attorney General, shall invest all the funds in the System Trust Fund" Similarly, section 121.151, Florida Statutes, provides that "[t]he Board of Administration, created by authority of the State Constitution, shall invest and reinvest available funds of the System Trust Fund in accordance with the provisions of ss. 215.44-215.53." The SBA's powers with respect to the Pension Fund derive from these legislative grants, not from the text of the Constitution. Further, nothing in the Constitution places any limitation relevant to this discussion on the composition of the authority supervising the Pension Fund.

While change to the composition of the SBA would require article IV, section 4(e), Florida Constitution, to be superseded by amendment, nothing in the Constitution abridges the legislature's plenary power to create a new statutory authority to administer the Pension Fund. The Florida Supreme Court has repeatedly made clear that the legislature has plenary power to enact any law "unless . . . clearly contrary to some express or necessarily implied prohibition found in the Constitution." *Savage v. Bd. of Pub. Instruction*, 133 So. 341, 344 (Fla. 1931), *quoted in, e.g., Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 141 (Fla. 2008) (acknowledging legislature's plenary power to create public system for legal representation of indigents who cannot be represented by public defenders due to conflicts). "Absent a constitutional limitation, the Legislature's discretion reasonably exercised is the sole brake on the enactment of legislation." *Bush v. Holmes*, 919 So. 2d 392, 406 (Fla. 2006) (citation and quotation omitted). As such, the legislature has the power to redefine the composition of the authority supervising the Pension Fund.

Sincerely,



Major B. Harding

MBH/cds