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October 25, 2017

**VIA E-MAIL
VIA FEDEX**

Mr. Jeremy Berry
City Attorney
City of Atlanta
Department of Law
55 Trinity Avenue
Suite 5500
Atlanta, Georgia 30303

Re: Proposed Ordinance 17-O-1589

Dear Mr. Berry:

On behalf of the General Employees' Pension Fund ("GEPF") and the GEPF Board of Trustees (the "Board"), I am writing in connection with certain potential legal questions regarding proposed ordinance 17-O-1589 (the "Proposed Ordinance"). It is the Board's hope that the City Law Department can assist us by providing feedback to the questions and requests for information identified in bold below.¹

I. Background

As currently drafted, the Proposed Ordinance would materially impact the governance of the GEPF. The Board remains committed to governance best practices and operating in the best interest of plan participants and beneficiaries. Among other things, the Board is assessing the prudence, checks and balances and propriety of the Proposed Ordinance's provision to give the Mayor of the City of Atlanta the power to appoint a majority of the trustees of a consolidated board that would oversee more than \$3 billion of retiree assets. The Board is also assessing whether there is

¹ Nothing in this letter is intended to be a waiver of attorney-client, work-product or other similar privileges by GEPF and the Board.

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credible data and evidence demonstrating there would be material savings as a result of the consolidation of services as contemplated by the Proposed Ordinance.

Equally important, the Board must assess the legality of the Proposed Ordinance, particularly under relevant Georgia state law. The Board has thus requested a legal assessment and analysis of various components of the Proposed Ordinance as a part of the Board's comprehensive fiduciary review, prior to making any recommendation related to the Proposed Ordinance. Following a presentation by Ms. Kristin Denius from the City Law Department during the October 4, 2017 GEPP Board meeting (the "October Meeting"), the Board resolved that we provide the City Law Department with an overview of the questions we have identified and seek feedback from the City Law Department.

During the course of our diligence, we identified legislation confirming that the GEPP and certain other pension funds (the Police Officer's Pension Fund or "POPF" and the Firefighter's Pension Fund or "FPF," collectively, the "Pension Funds"), were established by the Georgia General Assembly. We also identified subsequent amendments confirming that the General Assembly amended the original enacting statutes numerous times. The most recent amendments to each of the respective enacting (enabling) statutes contain language contemplating a specific governance structure for each of the boards of the Pension Funds. We further reviewed state law, case law and secondary sources.

As addressed in detail below, our review has raised certain questions regarding the Proposed Ordinance. These questions, in turn, raise the over-arching question as to whether the Proposed Ordinance can be enacted by the City of Atlanta or can legally take effect absent amendment of relevant Georgia state law by the Georgia General Assembly.

II. Preliminary Analysis and Questions

1. Each of Pension Funds was established by the Georgia General Assembly.

During the October Meeting, Ms. Denius presented a historical overview of the General Assembly's establishment of the Pension Funds, stating that, ". . . [t]he pension boards were . . . created separately in the 20's . . . under state law of local application."

We note that each of the enacting statutes were cited (i.e, as current law) by the Georgia Court of Appeals in a 2005 decision interpreting independent authority of the three pension boards to contract for administrative and legal services (Enclosed at Tab A).² The *Southern* court noted that:

The statute creating the City of Atlanta Fire Fighters Pension Fund was enacted in 1924 with the purpose of establishing a fund to provide retirement and disability benefits to firefighters employed by the City of Atlanta. *See* Ga. L. 1924, p. 167 et seq. . . .

² *City of Atlanta v. S. States Police Benevolent Ass'n. of Ga.*, 623 S.E.2d 557 (2005).

. . . [T]he statute creating the City of Atlanta Police Officers Pension Fund was enacted in 1925 to provide retirement and disability benefits to police officers employed by the City of Atlanta. *See* Ga. L.1925, p. 228 et seq. . . .

. . . [T]he statute creating the City of Atlanta General Employees Pension Fund was enacted in 1927 to provide retirement and disability benefits to officers and employees of the City of Atlanta and the Atlanta Board of Education. *See* Ga. L.1927, p. 265 et seq.³

Each of the respective enacting General Assembly statutes (the "Pension Statutes") are enclosed for your review and consideration (Enclosed at Tabs B-D).

2. The Georgia General Assembly Amended the Pension Statutes and the amendments contemplate specific governance structure provisions for each of the boards of the Pension Funds.

During the course of our research, we located dozens of subsequent amendments by the Georgia General Assembly to the Pension Statutes (the "Pension Amendments"). We have included a complete set of the Pension Amendments as produced by our search results (Enclosed at Tabs E-G). Most notably, we identified the following General Assembly session laws:

- [An Act to] amend an Act approved August 13, 1924 (Ga. Laws 1924, pp. 167, et seq.), as amended, providing a system of pensions and other benefits for members of paid fire departments in cities having a population of more than 300,000 (Ga. Laws 1973, p. 2837) as disclosed by the United States census of 1920, or any subsequent census, shall furnish aid, relief and pensions to members of paid fire departments now in active service, and whose names are on the payroll of such department and to future members, and their dependents in specified cases, and for other purposes set forth in the caption of said Act and the several Acts amendatory thereof, so as to repeal in its entirety Section 6 of said Act, as amended, which section provides for the establishment of a board of trustees and further pertains to the duties and membership of said board, and to enact, in lieu thereof, a new section pertaining to said matters; to provide an effective date; to repeal conflicting laws; and for other purposes.⁴ (emphasis added) (Enclosed at Tab H).
- [An Act to] amend an Act approved February 15, 1933 (Ga. Laws 1933, pp. 213, *et seq.*), as amended, providing pensions for members of police departments in cities having a population of 300,000 (Ga. Laws 1973, p. 2832) or more according to United States Census of 1920, or any subsequent census thereof, requiring the furnishing of pensions to all officers and employees of such cities who have served for 25 years, now in active service, whose names are on the payroll of the city, and to future members as specified, and for other purposes more fully set out in the captions of said Act, and the several Acts amendatory thereof, providing a system of pensions and other benefits in lieu of like pension benefits provided by existing provisions, so as to provide that enrollment pursuant to the provisions of this Act, as amended, shall be irrevocable; to provide that, except under specified circumstances, the refund of employee contributions shall be prohibited; to

³ *Id.* at 564-65.

⁴ 1980 Ga. Laws pp. 3201 et seq.

repeal in its entirety Section 6 of said Act, as amended, which section provides for the establishment of a board of trustees and further pertains to the duties and membership of said board, and to enact, in lieu thereof, a new section which shall provide or an increase in the terms of the elected employee members from one year to four years; to stagger the terms and elections of said employee members; to provide that retirees may vote for and qualify as candidates for said employee member positions; to authorize the board of trustees to adopt all rules necessary to carry out provisions related to the election of its members; to provide an effective date; to repeal conflicting laws; and for other purposes.⁵ (emphasis added) (Enclosed at Tab I).

- [An Act to] amend the Act approved August 20, 1927 (Ga. L. 1927, pp. 265, et seq.), as amended, providing that cities having a population of more than 300,000 (as provided in an amendment to said Act in Ga. L. 1972, p. 3803, Section 1, approved April 13, 1972), according to the United States Decennial Census of 1970, or any such future census, shall furnish pensions to all officers and employees of such cities and for such purposes set forth in the caption of said Act and the several Acts amendatory thereof, particularly as amended by Ga. L. 1981, pp. 4376, *et seq.*, so as to correct an inadvertent reference to the "Superior Court of Fulton County," and to provide that matters pertaining to workers' compensation shall not be considered as evidence in a pension application before the Board of Trustees of said pension fund; to amend an Act approved August 20, 1927 (Ga. L. 1927, p. 265) providing that cities having a certain population shall furnish benefits to officers and employees of such cities and for such other purposes set forth in the caption of said Act, as amended, particularly by an Act approved April 9, 1963 (Ga. L. 1963, p. 3061), by an Act approved March 4, 1964 (Ga. L. 1964, p. 2407), and by an Act approved March 28, 1974 (Ga. L. 1974, p. 3546), so as to provide for terms of the members of and vacancies occurring in said Board; to provide for necessary rules; to amend an Act approved February 15, 1933 (Ga. L. 1933, pp. 213, *et seq.*), as amended, providing for pensions for members of police departments in cities having a population of 300,000 (Ga. L. 1973, p. 2832) or more according to the latest census of the United States or any subsequent census thereof, and for other purposes more fully set out in the caption of said Act, as amended, particularly as amended by Ga. L. 1981, pp. 4381, *et seq.*, and Ga. L. 1978, pp. 4527, *et seq.*, so as to correct an inadvertent reference to the "Superior Court of Fulton County"; to provide that said Act shall not affect nor be affected by workers' compensation except as provided in subsection (F) of Ga. L. 1978, pp. 4527, *et seq.*; and that matters pertaining to workers' compensation shall not be considered as evidence in a pension application before the Board of Trustees of said pension fund; to amend an Act approved August 13, 1924 (Ga. L. 1924, pp. 167, *et seq.*), as amended, providing a system of pensions and other benefits for members of paid fire departments in cities having a population of more than 300,000 (Ga. L. 1973, p. 2837) according to the latest census of the United States or any subsequent census thereof, and for other purposes more fully set out in the caption of said Act, particularly as amended by Ga. L. 1981, pp. 3553, *et seq.*, and Ga. L. 1978, pp. 4508, *et seq.*, so as to correct an inadvertent reference to the "Superior Court of Fulton County"; to provide that said Act shall not affect nor be affected by workers' compensation except as provided in subsection (F) of Ga. L. 1978, pp. 4508, *et seq.*; and that matters pertaining to workers' compensation shall not be considered as evidence in a pension application before the Board of Trustees of said

⁵ *Id.* at pp. 3205 et seq.

pension fund; to provide an effective date; to repeal conflicting laws; and for other purposes.⁶ (emphasis added) (Enclosed at Tab J).

3. *The current governance structure of each of the Pension Funds, as codified in the City of Atlanta Code of Ordinances corresponds to the language contained in the Georgia General Assembly's most recent Pension Amendments.*

The Pension Amendments referenced in Section 2 contain language outlining the governance structure of each of the boards of the Pension Funds that exactly mirrors the board governance structure provisions of §§ 6-141, 6-281 and 6-421 of the Charter and Related Laws of the City of Atlanta (the "City Code"), as currently in effect and which is proposed to be amended by the Proposed Ordinance. As noted above, we have enclosed the Pension Amendments for your consideration. **Can you provide additional context or materials supporting how and why the language in the 1980s Pension Amendments first appeared in the City Code understanding it exactly mirrors the Pension Amendments?**

4. *The Pension Statutes and Pension Amendments status as "population bills".*

As Ms. Denius noted, the Pension Statutes are state laws of local application. During the course of our research, we reviewed several secondary resources which suggest that the Pension Statutes and corresponding Pension Amendments are "population acts" or "population bills." Historically, population acts were "a hybrid variety of general law" and were:

. . . drafted to affect only localities falling within certain population brackets according to a definite census that was specified in the act (e.g., a law providing that property titles may be recorded on microfilm in any count of the state having a population of not less than 185,000 or more than 190,000 according to the 1970 or any future census). Typically, only one city or county in the state fell within the brackets selected by the bill's drafter resulting in what was technically a "general law," but clearly one of local application.⁷

As reflected in the text of the Pension Amendments quoted above, the amendments were each referred to as follows:

[An Act to] amend an Act approved August 13, 1924 (Ga. Laws 1924, pp. 167, et seq.), as amended, providing a system of pensions and other benefits for members of paid fire departments in cities having a population of more than 300,000 (Ga. Laws 1973, p. 2837) as disclosed by the United States census of 1920, or any subsequent census . . .

[An Act to] amend an Act approved February 15, 1933 (Ga. Laws 1933, pp. 213, et seq.), as amended, providing pensions for members of police departments in cities having a population of 300,000 (Ga. Laws 1973, p. 2832) or more according to United States Census of 1920, or any subsequent census . . .

⁶ 1982 Ga. Laws pp. 4385 et seq.

⁷ Carl Vinson Inst. of Gov't, Univ. of Ga., *Handbook for Georgia Legislators* 155 (14th ed. 2014) (hereinafter, *Handbook for Georgia Legislators*).

[An Act to] amend the Act approved August 20, 1927 (Ga. L. 1927, pp. 265, et seq.), as amended, providing that cities having a population of more than 300,000 (as provided in an amendment to said Act in Ga. L. 1972, p. 3803, Section 1, approved April 13, 1972), according to the United States Decennial Census of 1970, or any such future census . . .

Similar "population" references were also included in the original enacting statutes. These references to specific population numbers thus appear to fall within the definition of a population act or population bill.

The framers of the 1983 Georgia constitution restricted new population acts, providing that:

No population bill, as the General Assembly shall define by general law, shall be passed. No bill using classification by population as a means of determining the applicability of any bill or law to any political subdivision or group of political subdivisions may expressly or impliedly amend, modify, supersede, or repeal the general law defining a population bill.⁸

The General Assembly codified the prohibition of population bills in the Georgia Code. O.C.G.A § 28-1-15 (Enclosed at [Tab K](#)). Joe Scheuer, a former staff member at the General Assembly Office of Legislative Counsel notes specifically in reference to this Code section on population acts, that:

The breadth and scope of this Code section has essentially shut the door on the enactment of new Population Acts. Population Acts enacted prior to 1997 remain in place, at least until challenged in court or repealed by the General Assembly.⁹

The aforementioned former staff member developed an informational tool, excerpts of which are enclosed for your consideration, which suggest, absent any other authority to the contrary, that the Pension Statutes are currently in force (Enclosed at [Tab L](#)).

During the course of our research, we did not identify any acts of the General Assembly repealing the Pension Statutes and Pension Amendments in favor of the City Code Provisions.

As discussed above, the *Southern* court cited the Pension Statutes in its analysis of the authority conferred upon each of the boards of the Pension Funds noting: "we will not construe the expansive language of these pension statutes in a manner that will render the language meaningless or reduce it to mere surplusage."¹⁰ **Is the City Law Department aware of any acts of repeal or any other authority to support a conclusion that the Pension Statutes would not also need to be amended by the General Assembly so the Proposed Ordinance would not be in conflict with Georgia law?**

⁸ GA. CONST. of 1983, art. III, § VI, ¶ IV(b).

⁹ Joe Scheuer, *Population Acts of Georgia: A Pernicious Profusion of Confusion 2* (2016).

¹⁰ *Southern*, 623 S.E.2d at 455.

5. Application of Georgia's home rule doctrine as it applies to the Pension Statutes and the Proposed Ordinances.

Article 9 of the Georgia Constitution provides the supreme law in the State of Georgia for governance of counties and municipal corporations and to a limited extent, provides local governments with a measure of independence under a home rule system.¹¹ The pertinent text states:

The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly.¹²

In other recent litigation involving the Pension Funds, the Georgia Supreme Court confirmed that the Georgia Constitution and Code authorize a municipal corporation's governing authority to provide retirement and pension benefits.¹³ In *Borders* (Enclosed at Tab M), the Georgia Supreme Court cited to:

- A. The General Assembly's delegation of certain general powers to establish retirement systems and to provide methods of financing such systems, under the Georgia Code's local government provisions which reads in pertinent part:

In addition to the other powers which it may have, the governing body of any municipal corporation shall have the following powers, under this chapter, relating to the administration of municipal government...The power to establish, merit systems, retirement systems retirement systems and insurance plans for all municipal employees...and to provide the method or methods of financing such systems and plans...¹⁴

- B. The General Assembly's delegation of certain powers to provide retirement benefits, under the Georgia Code's local government provisions, as authorized under the constitution's home rule doctrine which reads in pertinent part:

The governing authority of each municipal corporation is authorized to . . . provide . . . retirement and pension benefits . . . for its employees, their dependents, and their survivors . . .¹⁵

- C. The Georgia Constitution's provision authorizing the exercise of supplementary powers to maintain and modify retirement systems which reads in pertinent part:

¹¹ *Handbook for Georgia Legislators* at 133.

¹² GA. CONST. of 1983, art. IX, § II, ¶ II.

¹³ *Borders v. City of Atlanta*, 779 S.E.2d 279 (2015).

¹⁴ O.C.G.A § 36-34-2(4) (2017).

¹⁵ *Id. at* § 36-35-4(a) (2017).

In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any county, municipality, or any combination thereof may exercise the following powers and provide the following services. . . . The power to maintain and modify heretofore existing retirement or pension systems, including such systems heretofore created by general laws of local application by population classification, and to continue in effect or modify other benefits heretofore provided as a part of or in addition to such retirement or pension systems and the power to create and maintain retirement or pension systems for any elected or appointed public officers and employees whose compensation is paid in whole or in part from county or municipal funds and for the beneficiaries of such officers and employees.¹⁶

In *Borders*, the Court wrote that:

cited legislation explicitly contemplates that a municipal corporation's provision of retirement or pension benefits to its employees be read in conjunction with the terms of local law and ordinances, that is, that such provision of benefits be supplemented by local law such as that contained in the Code of the City of Atlanta ("City Code") and the Charter of the of the City of Atlanta ("City Charter").¹⁷

Does the City Law Department interpret *Borders* to extend beyond municipal authority to provide for payment and benefits to governance matters addressed in the General Assembly Pension Statutes? If so, what is the basis and analysis for that interpretation? If *Borders* is to be applied to the question of the City's authority to enact the Proposed Ordinance, would the City's authority derive from the supplementary power to "maintain and modify heretofore retirement systems, including such systems created by general laws of local application by population classification"?

If so, we quote from the Georgia Constitution the following provision:

Nothing contained within [the Supplementary Powers provision] shall operate to prohibit the General Assembly from enacting general laws relative to the subject matters listed in subparagraph (a) of this Paragraph or to prohibit the General Assembly by general law from regulating, restricting, or limiting the exercise of the powers listed therein . . ."¹⁸

If the Pension Statutes and Pension Amendments (which contemplate specific governance structures for each of the Pension Funds) are general laws in force, has the General Assembly's provisions for pension governance in the Pension Statute and Pension Amendments limited the exercise of the City's supplementary power to alter the governance structure of the Pension Funds?

In *Borders*, the Court noted that an analysis of the legality of a City Ordinance:

¹⁶ GA. CONST. of 1983 art. IX, § II, ¶ III(a)(14).

¹⁷ *Borders*, 779 S.E.2d at 283.

¹⁸ GA. CONST. of 1983 Art. IX, § II, ¶ III(b)(2)(c).

must begin with the recognition that municipal corporations are creations of the State, and therefore have only those powers that have been expressly or impliedly granted to them... assessing the validity of a city ordinance generally involves a two-step process: the first inquiry is whether the city possessed the power to enact the proposed ordinance at issue, and if the power exists, the second question is whether the exercise of that power is clearly reasonable.¹⁹

Additionally, as noted by the court in *Southern*, the City Code provides that

functions of boards, commissions, councils, authorities and other similar bodies of the city, whether established by Acts of the General Assembly or the city council, shall be provided for by ordinances or resolutions of the city council. However, any boards, commissions, councils, authorities and other similar bodies which derive their powers from general law shall continue to exercise such powers.²⁰

The court further noted that "[t]his provision evidences a clear legislative intent to permit the respective pension boards to retain their preexisting management authority free of interference from the City of Atlanta."²¹

6. *The City Charter requires that the City Council take certain steps prior to the passage of the Proposed Ordinance.*

Section 3-507 of the Atlanta City Charter

requires that before the Atlanta City Council may modify existing pension laws, there must be an investigation and report from an independent actuary, written recommendations provided by the affected pension boards, written recommendations provided by the City Attorney and Chief Financial Officer, and a two-third affirmative vote of the City Council.²²

So we can work together in concert with the City, we would appreciate receiving a detailed timeline of compliance with the process outlined in the City Charter, including a timeline for the City Council Finance/Executive Committee work session meetings discussed in the October Meeting.

III. Conclusion

We understand that the Proposed Ordinance has been presented as an initial draft and recognize that other proposals to improve upon the Proposed Ordinance may be presented in the future. We believe that a prudent course of action requires a thoughtful analysis of all potential legal issues that proposed legislation may present, including to ensure that the final legislation comports with state and local law and to avoid potential disruption posed by injunctive relief actions or other legal

¹⁹ *Borders*, 779 S.E.2d at 282.

²⁰ Charter and Related Laws of the City of Atlanta § 3-401(i).

²¹ *Southern*, 623 S.E.2d at 455.

²² *Southern*, 623 S.E.2d at 566 n.10.

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challenges.²³ As such, we would greatly appreciate feedback by the City Law Department to the questions raised above as the Board of the GEPF continues to assess the Proposed Ordinance.

Sincerely,



Peter K.M. Chan
Counsel to the General Employees' Pension Fund
PKC
Enclosures

²³ The Proposed Ordinance, if enacted, will materially affect the interests of a broad range of entities and individuals. To the extent there is any significant question as to the legality of the Proposed Ordinance under Georgia state law, it seems clear that many parties will have standing to challenge the ordinance. Such legal challenges may include lawsuits seeking a temporary restraining order and a preliminary injunction against the implementation of the ordinance. We seek to avoid unnecessary costs throughout this process.