STATE OF FLORIDA
FOURTH DISTRICT COURT OF APPEAL

THE BOARD OF TRUSTEES OF
THE CITY, ETC., ET AL.

Appellant/Petitioner(s),

vs.

CITY OF HOLLYWOOD, ETC.,

Appellee/Respondent.
_____/

CASE NO.: 4D13-0014, 4D13-15
L.T. No.: 12-1000 05, 12-1000 05

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STATEMENT OF THE CASE AND FACTS

Two sets of Plaintiffs filed complaints and amended complaints for declaratory and injunctive relief in this case: First, the Board of Trustees of the City of Hollywood Firefighters' Pension System ("Firefighters Board" and William Huddleston ("Huddleston") (collectively known as the "Firefighter Plaintiffs") (Record on Appeal ("R"): 1, 69); and secondly, Board of Trustees of the City of Hollywood Police Officers' Retirement System ("Police Board") and Van Szeto ("Szeto") (collectively referred to as the "Police Plaintiffs").[1] The Firefighters Board and the Police Boards will collectively be referred to as the "Board Plaintiffs." Huddleston and Szeto will collectively be referred to as the "Individual Plaintiffs."

The matters pertinent to this appeal were heard on the motions to dismiss Plaintiffs' amended complaints (R: 163) filed by Defendant/Appellee, the City of Hollywood ("City"), as well as competing Motions for Summary Judgment filed by Plaintiffs and the City (R: 284 & R: 338). Since the Order Granting Defendant

[1] In preparing the Record on Appeal, the Clerk of the Circuit Court failed to include the complaint and amended complaint of the Police Plaintiffs, as well as the City of Hollywood's motions to dismiss the complaint and amended complaint of the Police Plaintiffs, apparently through oversight, in that the two cases were consolidated after the amended complaints were filed. (R: 234-235). As explained herein, for the purposes of this appeal the allegations of both sets of Plaintiffs are substantially the same, and therefore the references to the record will be primarily to the Firefighters Amended Complaint, and thus may not be able to include similar allegations in the Police Amended Complaint.

City's Motion for Partial Summary Judgment and Response to Plaintiffs' Motion for Partial Summary Judgment as to the Final Counts of the Amended Complaints ("Order") also granted the City's motions to dismiss as to the counts at issue in this case (R: 390, 394), the allegations in Plaintiffs' amended complaints must be deemed as true for the purposes of this appeal.

The Firefighter Plaintiffs and the Police Plaintiffs each filed complaints for declaratory and injunctive relief against the City. (R: 1) Both sets of Plaintiffs filed amended complaints on March 7, 2012. (R: 96) The Firefighter complaints had four counts and the Police complaints had three counts, and except as to the one unique count not pertinent to this appeal, both sets of complaints were based upon substantially similar sets of facts.

As explained in the Firefighters Amended Complaint, the Firefighters Board is established under City Code § 33.037 to operate the City of Hollywood Firefighters' Pension System ("Pension System"), with the concomitant administrative powers and fiduciary obligations necessary to do so. (Firefighters Amended Complaint ("FAC"): ¶¶3-6, R: 97-98) Huddleston is a firefighter for the City and a member of the Pension System entitled to its benefits. (FAC: ¶¶ 11-13, R: 100)

With regard to the Police complaint and amended complaint, the Police Board is established under City Code § 33.132 to operate the City of Hollywood

Police Officers' Retirement System ("Retirement System"), with administrative powers and fiduciary obligations similar to those of the Firefighters Board. (R: 329-331) Szeto is a police officer for the City and a member of the Retirement System entitled to its benefits. (R: 334-337)

The Police and Firefighter Complaints were filed as the result of a referendum vote of the City's electorate on September 13, 2011, that adopted Ordinance Nos. 0-2011-26 & 0-2011-27 ("the Ordinances"), which were approved by the City Commission on September 7 in order to modify the Code provisions governing the two Pension Systems. [2] (R: 1-2, 286) Since the Ordinances modify the existing City Code, City Code §§ 33.062 and 33.138 require that the Ordinances could only go into effect if approved by a super majority of the City Commission, and also by the City firefighters and police officers, respectively; or, if no such approvals were obtained, by affirmative votes of the electorate in a referendum election. Since the approvals did not occur, the City had to hold the referendum election to implement the revisions. (F.A.C. ¶¶ 28-29, R: 96, 105)

The City approved submission of the Ordinances to the City electorate in a stated effort to save the City money, by lowering benefits available to members of the Pension Systems, as well as to members of the pension system for other City

[2] While the Firefighters have a Pension System and the Police have a Retirement System, for simplicity's sake the systems will collectively be referred to as the Pension Systems.

employees, effective October 1, 2011. (F.A.C. ¶¶ 39-39, R: 96, 106-108; F.A.C. ¶¶ 53-60, R: 110-114) Because the Ordinances would also have the effect of modifying collective bargaining agreements between the City and its firefighter and police unions, the City was first required under § 447.4095, Fla. Stat., to adopt resolutions determining that there was a financial urgency, and then to attempt to reach agreement with the police and firefighters on proposed changes to address the urgency. That statute requires a governmental entity to undertake certain dispute resolution procedures before attempting to modify a collective bargaining agreement.

The City Commission adopted Resolution Nos. R-2011-117 & R-2011-118 ("the Resolutions") on May 18, 2011. (FAC ¶ 76, R: 118) The Resolutions declared the existence of a financial urgency for fiscal years 2011 and 2012 respectively, the latter lasting through September 30, 2012. (*Id.*)

Count I of the Amended Complaints sought a declaration that the firefighter and police officer Ordinances, respectively, were invalid because they were not approved by the City Commission or submitted to the City voters in compliance with the City Code or state law; an injunction against the Ordinances' continued implementation; and a restoration of the retirement systems to the status quo prior to enactment of the Ordinances. As explained below, those counts are not at issue

in this appeal. Plaintiffs voluntarily dismissed Count II and III of the Firefighters Complaint and Count II of the Police Complaint. (R: 357)

Count IV of the Firefighters Amended Complaint and Count III of the Police Officers Amended Complaint are the counts subject to the summary judgment motions at issue in this case, in addition to being a part of the City's motions to dismiss. These counts did not challenge the validity of the Ordinances or the Resolutions approving the financial urgency determinations. Rather, these counts alleged that the Ordinances, even if validly enacted, could only remain in effect through September 30, 2012, which was the end of the City's 2012 fiscal year; and therefore that the court should grant declaratory and injunctive relief to that effect. (FAC ¶¶ 74-82, R: 118-119)

The City filed motions to dismiss the Amended Complaints. (R: 163) Prior to the completion of hearings on those motions, Plaintiffs filed a Motion for Partial Summary Judgment as to the final counts of the Amended Complaints. (R: 284) The City then filed its own Motion for Partial Summary Judgment as to the final counts. (R: 338)

As further explained in their Motion for Partial Summary Judgment, the essence of Plaintiffs' claims was that the City's financial urgency determinations could only allow the City to implement the Ordinance modifications for as long as the determinations themselves existed, which would be September 30, 2012.

Otherwise, the City would be able to use the time-limited financial urgency process to implement permanent modifications to the Ordinances, thereby being able, effectively, to eliminate altogether the existing contract rights of the police and firefighters and their ongoing rights to bargain collectively, other than to the extent allowed in the City's absolute discretion—whatever the future financial situation of the City. In other words, the City could otherwise use urgency determination procedures specifically designed to be time-limited financial to effectuate permanent changes to the City Code provisions implementing those agreements.

On December 6, 2012, the Court issued the following orders: (1) an Order Granting Defendant's Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief, with leave to amend, as to the first counts of the Amended Complaints[3] (R: 383); (2) an Order Denying Plaintiffs' Motion for Partial Summary Judgment (R: 389) and (3) the order that is the subject of this appeal, the Order Granting Defendant City's Motion for Partial Summary Judgment and Response to Plaintiffs' Motion for Partial Summary Judgment as to the Final Counts of the Amended Complaints ("Order"). (R: 390)

The Order granted the City's Motion for Summary Judgment, and also dismissed the Firefighter and Police counts subject to the summary judgment motion. (Order, p. 5, R: 394) This also had the effect of granting the City's motion

[3] Plaintiffs have filed Second Amended Complaints as to these counts, and that matter remains pending in Broward County Circuit Court.

to dismiss as to those counts with prejudice, as the dismissal was on the basis of subject matter jurisdiction. The Court held that that the Public Employees Relations Commission ("PERC") had exclusive jurisdiction under Ch. 447, Fla. Stat.,[4] "for resolving labor disputes between public employers and public employees;" that "Plaintiffs arguments are arguably, if not squarely, covered under Chapter 447;" and that the declaration Plaintiffs were seeking as to how long the Ordinances would remain in effect "would require the court to interpret and construe provisions of Chapter 447." The Court concluded that it therefore lacked subject matter jurisdiction over these counts, and dismissed them. (Order, pp. 4-5, R: 393-394) As a result, the Court did not reach the merits of Plaintiffs' Motion for Summary Judgment.

On January 3, 2013, the Firefighter Plaintiffs and the Police Plaintiffs filed separate notices of appeal of the Order. (R: 395, 404) This Court has consolidated those appeals.

SUMMARY OF ARGUMENT

Plaintiffs do not allege that the City failed to comply in any way with the financial urgency process that enabled enactment of the Ordinances at issue. Plaintiffs only seek a judicial determination of whether the changes brought by the

[4] More precisely, Ch. 447, Pt. II, Fla. Stat., addresses public employee issues, but the statutory references will be used interchangeably in this Brief, given that the court used the more general reference.

Ordinances can last longer than the length of the financial urgency determination that enabled them, until September 30, 2013, particularly given that both statutorily under § 447.4095, Fla. Stat., and constitutionally under Fla. Const. Art. I, §§ 6 & 10, governmental bodies are very limited in the extent to which they can enact legislation that has the effect of making unilateral changes to collective bargaining agreements between public employers and employees, .

In granting the City's summary judgment motion and dismissing these counts to Plaintiffs Amended Complaints with prejudice, the circuit court's fundamental error was in basing its dismissal on Plaintiffs' failure to exhaust administrative remedies at PERC, because no such remedies exist at PERC. Plaintiffs do have a remedy in circuit court through declaratory and injunctive relief, which they should have been allowed to pursue.

In order to exhaust administrative remedies as a condition precedent to initiating civil litigation, there must be an administrative action to contest, and there must be an administrative remedy that is available and adequate to afford the relief being sought. *See, e.g., District Bd. of Trustees of Broward Community College v. Caldwell,* 959 So.2d 767, 770 (Fla. 4th DCA 2007). In this case, there was neither a remedy, nor was any relief available, at PERC.

The Order was issued shortly before these principles were addressed in a District Court opinion involving very similar issues to this case. In *Artz ex rel.*

Artz v. City of Tampa, 102 So.3d 747 (Fla. 2d DCA 2012), the court held that plaintiffs can seek judicial relief regarding a public employee-related issue where those plaintiffs had no administrative remedy at PERC Furthermore, the Fourth District Court has long held that a plaintiff has a general right to seek declaratory and injunctive relief with regard to the interpretation of a municipal ordinance where an existing administrative remedy cannot provide that relief to such a plaintiff. *Perry v. City of Ft. Lauderdale*, 387 So.2d 518 (Fla. 4th DCA 1980). These case, and the others cited herein, demonstrate why the conclusion in the Order to the contrary must be set aside, and Plaintiffs be allowed their day in court.

ARGUMENT

I. THE COURT'S DISMISSAL WAS IN ERROR BECAUSE PLAINTIFFS HAD NO AVAILABLE ADMINISTRATIVE REMEDIES TO EXHAUST

A. Standard of Review

The Circuit Court granted the City's Motion for Partial Summary Judgment, as well as the City's Motions to Dismiss as to the counts at issue, because it "found that it lacks subject matter jurisdiction over count IV of the Fire Amended Complaint and count III of the Police Amended Complaint." (Order, pp. 4-5, R: 393-394) Whether a court has subject matter jurisdiction is a question of law, to be reviewed *de novo*. *See, e.g., Baudanza v. Baudanza*, 78 So.3d 656, 658 (Fla. 4th DCA 2012).

B. Argument on Merits

1. The Circuit Court's rationale

At issue in the counts of the Amended Complaints before this Court is a request by Plaintiffs for a judicial declaration regarding how long changes to the City Code can last where those changes were enabled by financial urgency determinations that lasted for only a limited time period. Plaintiffs do not dispute the legitimacy of those determinations, only how they impact the City Code.

Two groups of Plaintiffs seek this determination, the Board Plaintiffs and the Individual Plaintiffs. The City has already acknowledged that the Board Plaintiffs have no standing to seek administrative relief at PERC for these claims or for any other relief at PERC.[5] The parties do dispute the extent to which the Individual Plaintiffs have standing to pursue these claims before PERC. The parties also dispute the City's apparent claim, though not specifically articulated, that the relief Plaintiffs are seeking is not available to the Individual or the Board Plaintiffs under any circumstances.

The Circuit Court agreed with all parties in holding that the Board Plaintiffs lacked standing to seek relief at PERC. The parties' disagreement stems from the

[5] For example, the City stated on page 23of its Motion to Dismiss the Firefighters Complaint that the Firefighter Board "lacks standing even to raise the issue of Section 4095 [financial urgency], because such a challenge is subject to PERC's exclusive jurisdiction and the board could not be a proper party in **any action** before PERC." (R: 90, emphasis added.)

court's further determination that the Board Plaintiffs therefore have no remedy at all, based upon a rationale that if a matter concerns any aspect of an issue some part of which can be considered at PERC, then all consideration of any aspect of that issue must necessarily fall within the exclusive jurisdiction of PERC. Irrelevant to the court's analysis was whether PERC even had subject matter jurisdiction over the specific issue in dispute. This irrelevance is illustrated by the following excerpts from the Order.

The court recognized, "Not every dispute gives rise to the preemptive jurisdiction of PERC." (R: 393, Order, p. 4) The court then concluded, however, that if a plaintiff without standing at PERC has a dispute that "arguably" involves Ch. 447, Pt. II, Fla. Stat., which governs PERC's jurisdiction, that plaintiff has no remedy at all, because PERC jurisdiction is "preemptive" as to everyone. (*Id.*) As the court stated, "Plaintiffs' arguments are arguably, if not squarely, covered under Chapter 447" (emphasis added), which therefore prevented the court from considering Plaintiffs' claims, because

> Such declaration would require the court to interpret and construe provisions of Chapter 447 relating to financial urgency and provisions of the above-mentioned collective bargaining agreements. The court finds that such matters are within PERC's jurisdiction.

(*Id.*)

What this means, at least as to the Board Plaintiffs, is that the court determined that those plaintiffs lack any judicial or administrative forum whereby they could seek the requested declaration on the issue of how long changes to ordinances can last where those changes were enabled by the time-limited financial urgency determination procedures under § 447.4095, Fla. Stat., simply because § 447.4095 is a provision of public labor law under Ch. 447, Fla. Stat. Because an administrative remedy does exist at PERC for challenging the lawfulness of financial urgency determinations under that chapter, the court concluded, effectively, that any issue in any way relating to a financial urgency determination must be heard at PERC or it cannot be heard at all—even where, as here, PERC has no administrative remedy to address a matter unrelated to the compliance of that determination with the procedures outlined in § 443.4095.

As the following discussion explains, the court was wrong on two fronts. First, if a party lacks standing at PERC, there can be no any requirement that the party exhaust its administrative remedies at PERC, because the party has none. Secondly, no party need exhaust administrative remedies if PERC lacks jurisdiction to grant the relief requested in the first place, whether or not the party or some other party might have standing to seek relief at PERC for some other, related issue. Here, no exhaustion requirement exists on either front. PERC does not have jurisdiction over the person of the Board Plaintiffs to grant them any type

of relief before PERC, and PERC lacks jurisdiction over the subject matter of the specific relief requested to either the Individual or the Board Plaintiffs. Jurisdiction instead only belongs in the circuit court.

2. The doctrine of exhaustion of administrative remedies

The circuit court's reasoning necessitates an examination of the doctrine of exhaustion of administrative remedies ("Doctrine"). As stated, for example, in *District Bd. of Trustees of Broward Community College v. Caldwell,* 959 So.2d 767, 770 (Fla. 4th DCA 2007), the Doctrine provides that "one seeking judicial review of administrative action must first exhaust such administrative remedies as are available and adequate to afford the relief sought." (Emphasis added.) In other words, there are two basic conditions that must be met before the Doctrine applies: First, there must be administrative action to review; and secondly, there must be an administrative remedy to that action that is "available and adequate."

3. Plaintiffs have no "available and adequate" administrative remedy

As to the issue of whether Plaintiffs have administrative remedies that are "available and adequate," that issue was recently addressed in *Artz ex rel. Artz v. City of Tampa*, 102 So.3d 747 (Fla. 2d DCA 2012), in a manner that directly contradicts the reasoning in the Order here. Judge Eade was unable to factor this case into his analysis of the Doctrine's applicability, because *Artz* was decided after his Order had been rendered.

In *Artz* the plaintiffs were former police officers and firefighters who had retired based upon representations in a then-existing collective bargaining agreement between their unions and the City of Tampa that the retirees would receive a specified increase in their benefits—an increase that never materialized when the collective bargaining agreement was renewed. The plaintiffs sought declaratory, contract and tort relief based upon the alleged failure of the City of Tampa and its unions to implement the necessary increase at the time of the renewal.

Some of the *Artz* plaintiff retirees first brought an unfair labor practice before PERC based upon failure of the defendants to carry through with increasing the retirement benefits as promised in a 2001 agreement. PERC concluded that the retirees could not bring such an action because "they were not public employees . . . when the alleged unfair labor practice occurred." *Id.* at 750. PERC also said that the conduct by defendants did not constitute and unfair labor practice anyway. The plaintiffs then went to circuit court to seek declaratory, contract and tort relief based upon breach of the agreement, rather than upon whether the negotiation of the subsequent agreement constituted an unfair labor practice.

The circuit court dismissed, concluding that it lacked subject matter jurisdiction because plaintiffs failed to exhaust their remedies at PERC. The Second District Court reversed, holding that since the relief plaintiffs were seeking

did not involve matters for which they could obtain relief at PERC, there was no reason why plaintiffs had to go through the futile exercise of an unfair labor practice complaint at PERC. In support of this holding, the Second District cited numerous cases, including *Caldwell*. The court's succinct summary of its holding was this: "The law requires no futile act." *Artz, supra,* 102 So.3d at 751.

Artz noted that PERC had already opined that plaintiffs did not have standing to seek relief at PERC because of the simple fact that they were not public employees when they filed their complaint. Similarly, in this case the Board Plaintiffs are not public employees either—but a statutorily created entity with the power to sue. As previously noted in footnote two above, even the City recognizes that the Board Plaintiffs lack standing to seek any type of administrative relief at PERC.

Consistent with the "available and adequate" requirements of *Caldwell* and *Artz*, the Fourth District has also held that a plaintiff has a general right to seek declaratory and injunctive relief with regard to the interpretation of a municipal ordinance where an existing administrative remedy cannot provide that relief to such a plaintiff. *Perry v. City of Ft. Lauderdale*, 387 So.2d 518 (Fla. 4th DCA 1980). That case also has significant similarities to this one. There, a police union asked a circuit court for a declaration as to the meaning of a municipal ordinance that impacted how police salaries would be calculated. While there was a

grievance process by which an individual police officer could complain about wage issues, there was no process by which such an officer or the officer's union could seek administrative review to obtain a declaration as to how the wage ordinance should generally be interpreted in the first place. Setting aside the circuit court decision dismissing the claim on exhaustion grounds, the District Court concluded,

> What is at stake is the proper interpretation to be placed on the ordinance, a matter of statutory construction and therefore, a matter for the courts. There can be no question that an action for declaratory relief is the appropriate method for questioning the interpretation of a municipal ordinance.

Id. at 520. *Accord, Roth v. The Charter Club, Inc.*, 952 So.2d 1206, 1207 (Fla. 3rd DCA 2007).

4. There is no administrative action to review

As indicated by *Caldwell*, the other requisite component to the Doctrine is that there must be administrative action to review in the first place. This issue is pertinent as to all Plaintiffs, but is most clearly indicated as to the Individual Plaintiffs, since there is not dispute that the Board Plaintiffs would not have standing before PERC in any event. As current City public employees, the Individual Plaintiffs may have some remedies available at PERC. Even so, they do not have any administrative remedies to seek relief relating to the issues in this

case, because none of the Plaintiffs are requesting review of an administrative action.

The City must take administrative action as spelled out § 447.4095, Fla. Stat., to initiate the financial urgency determination process, which enables persons with standing at PERC to challenge the City's action as an unfair labor practice. The Plaintiffs have all stipulated, for the purpose of this lawsuit, that the process by which the City made its financial urgency determinations was lawful. They do not claim that the process constituted an unfair labor practice. There is no administrative action, therefore, for which Plaintiffs seek review.

Fla. R. App. P. 9.030(a) defines "administrative action" to include final agency action under Florida's Administrative Procedures Act, Ch. 120, Fla. Stat.; non-final agency action reviewable under the Act; and "quasi-judicial decisions by any administrative agency, board or commission" not covered by the Act. As a municipality, the City is excluded from the Act by § 120.52(1), Fla. Stat. The matter for which Plaintiffs seek judicial declarations, the interpretation of the Ordinances, does not otherwise involve "agency action," because the City's enactment of the Ordinances at issue is not "quasi-judicial" in nature.

Instead, the actions under review here are legislative in nature, the modification of City Ordinances. As stated, for example, in *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469, 474 (Fla.1993), a

legislative action by a local governing body is one that results in the formulation of a general rule of policy, whereas a quasi-judicial action results in the application of a general rule of policy. To the extent that the City's enactment of the Resolutions based upon the financial urgency determinations may have involved "agency action" by the City, those agency actions would have occurred in the context of the dispute resolution procedures that the City was required to undertake as part of the City's financial urgency requirements under §447.4095, Fla. Stat., the correctness which Plaintiffs have not challenged—not the legislative enactment of the Ordinances.

What Plaintiffs are seeking is a judicial declaration of how long the Ordinances enabled by those unchallenged agency actions relating to financial urgency can remain in the City Code—something, as *Perry* notes, over which a circuit court clearly has jurisdiction. No plaintiff would ever have standing at PERC to seek that kind of relief, because PERC lacks jurisdiction to make such a declaration in the first place.

PERC's jurisdiction is set forth in its enabling act, Ch. 447, Pt. II, Fla. Stat., which, as shown by § 447.201, Fla. Stat., was enacted to implement the collective bargaining rights of public employees as guaranteed by Fla. Const. Art. I., § 6. The establishment of PERC is described in § 447.205, Fla. Stat. In § 447.207, Fla. Stat., PERC is granted various "powers and duties," including at subsection (6) the

power to adjudicate certain "questions and controversies" between public employees and their employers:

> [PERC] shall resolve questions and controversies concerning claims for recognition as the bargaining agent for a bargaining unit, determine or approve units appropriate for purposes of collective bargaining, expeditiously process charges of unfair labor practices and violations of s. 447.505 by public employees, and resolve such other questions and controversies as it may be authorized herein to undertake.

These questions and controversies include disputes between employee and employer over the employer's determination that it has a "financial urgency" that the employer believes necessitates that it modify the collective bargaining agreements it has with its employees, using the process outlined in § 447.4095, Fla. Stat. That statute directs the parties to try to resolve their disputes through the impasse proceedings set forth in § 447.403, Fla. Stat. An aggrieved party can then seek an administrative remedy at PERC under § 447.403, Fla. Stat., on the grounds that the implementation of the financial urgency determination constituted an unfair labor practice.

Neither these statutes nor any others in Ch. 447, Fla. Stat., authorize PERC to respond to requests for declaratory relief as to how the proper enactment of a financial urgency determination might impact how long a subsequently amended municipal ordinance can remain in effect. Instead, the inquiry can only be on

whether the financial determination process was itself conducted in a manner that constituted an unfair labor practice under § 447.501, Fla. Stat.

The Order here holds that PERC has exclusive jurisdiction "to interpret and construe provisions of Chapter 447 relating to financial urgency and provisions of . . . collective bargaining agreements." (Order, p. 4, R: 393) That interpretation goes well beyond what § 447.207(6), Fla. Stat., identifies as the questions or controversies that PERC can in fact resolve. Nowhere else does the statute say that PERC has exclusive authority to consider any controversy whatsoever simply because may involve a provision of Ch. 447, Pt. II, Fla. Stat. The fundamental error of the circuit court, therefore, was to ignore the context in which Chapter 447 was relevant to this case.

Here, at least as to the Board Plaintiffs, the dispute is clearly not between a public employer and a public employee, since the City is a public employer and the Board Plaintiffs are not public employees the City. As to all Plaintiffs, the dispute is not one that PERC is statutorily authorized to consider, because none of the Plaintiffs are alleging that the City's financial urgency determinations constituted unfair labor practices under § 447.501, Fla. Stat.

Furthermore, PERC cannot reach beyond the confines of its expressly granted jurisdiction as a way of nonetheless reaching the issues in this case. As a governmental entity created by statute, PERC lacks the authority to resolve any

questions or controversies not specifically within the scope of its authority as established in Ch. 447, Pt. II., Fla. Stat. As stated, for example, in *Mathis v. Florida Dept. of Corrections*, 726 So.2d 389, 391 (Fla. 1st DCA 1999), "'Administrative agencies are creatures of statute and have only such powers as statutes confer.'" That case is particularly illustrative of the limits of PERC's jurisdiction because the district court there set aside PERC's issuance of a sanction against a public employee involved in a PERC termination hearing. Even though PERC clearly had jurisdiction over the subject matter of the hearing, it did not have the express statutory authority to issue the sanction simply because the sanctionable behavior occurred during the course of the hearing.

Thus, PERC's statutory authority limits its jurisdiction to "questions or controversies" that are between public employer and employee, and even within that subset jurisdiction is limited to "questions or controversies" that PERC is expressly authorized to resolve. This does not mean, however, that the Doctrine would prevent a circuit court from adjudicating a question or controversy that involves the effect of an action authorized under Chapter 447, Fla. Stat., where that law offers no PERC remedies to exhaust.

As previously noted, *Perry* recognized the inapplicability of the Doctrine to a party seeking declaratory relief in circuit court as to the construction of an ordinance. *Ass'n of Firefighters, Local Union 727 v. Board of City Com'rs of City*

of West Palm Beach, 448 So.2d 1212 (Fla. 4th DCA 1984), recognizes the more general principle that PERC jurisdiction over public labor-related issues is not exclusive—a principle that the Circuit Court in this case identified but failed to consider. In that case the District Court recognized the ability of a city to seek a declaration as to the constitutionality of an initiative petition in light of the requirements in Ch. 447, Fla. Stat., rather than to pass on the interpretation as being within the jurisdiction of PERC. The District Court stated that "we fail to find in Chapter 447 the express preemption (as opposed to preemption by implication) required by Section 166.021(3)(c), Florida Statutes (1981)." *Id.* at 1214.[6]

The court in *Ass'n of Firefighters* acknowledged the general principle as stated in *Maxwell v. School Bd. of Broward County*, 330 So.2d 177 (Fla. 4th DCA 1977), that "jurisdiction over labor activities is preempted in favor of PERC if the activities are 'arguably' covered by the provisions of Part II, Chapter 447." *Maxwell* further observed, "Not every activity or dispute between public employees and their public employer gives rise to the preemption jurisdiction of PERC . . . ." *Id.* at 179.

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[6] § 166.021, Fla. Stat., reserves to municipalities any matter not "expressly preempted to state or county government by the constitution or by general law." Since, as frequently noted, the action at issue here, the statutory interpretation of certain provisions of the City Code, is not expressly preempted by Ch. 447, Pt. II, Fla. Stat., then it would be appropriate to sue the City in circuit court to determine what those City Code provisions mean.

While the court in *Ass'n of Firefighters* went on to say that "we leave a full treatment of that question for another day," 448 So.2d at 1214, that court did in fact do something similar to what Plaintiffs seek but the City claims the circuit court here could not do because of PERC preemption—construe a proposed referendum to amend an ordinance whose change would impact future public employee/employer labor relationships, though the construction would not require any consideration of unfair labor practice claims. *Id.* at 1215. In other words, while the Fourth District did not give the preemption issue the "full treatment," the court did demonstrate by its very holding that a court can in appropriate circumstances interpret a provision of Ch. 447, Fla. Stat., completely outside the context of a PERC proceeding.

The City has cited to case law for the proposition that a plaintiff cannot avoid application of the Doctrine simply by suing for breach of contract rather than by bringing an unfair labor practice claim. *See, e.g., Miami Ass'n of Firefighters v. City of Miami,* 87 So.3rd 93 (Fla. 3rd DCA 2012). Plaintiff's claim of breach in that case, however, was based upon that city's alleged violations of Ch. 447, Pt. II, Fla. Stat., the evaluation of which were within PERC's jurisdiction. Here, once again, Plaintiffs are not alleging a violation of any provision of that law, and are in fact accepting for the purposes of this Count the validity of the Resolutions as enacted. Plaintiffs are simply asking a circuit court to interpret the Ordinances enabled by

the Resolutions as only being able to last as long as the effective life of those Resolutions—i.e., until October 1, 2012, the end of the fiscal year.

5. The constitutional ramifications

Finally, this Court should consider the constitutional ramifications associated with whether Plaintiffs can seek the requested declaratory relief. As previously noted, § 447.201, Fla. Stat., only gives PERC jurisdiction to resolve labor disputes between public employees and their employers, most frequently through unfair labor practice claims. *See also,* J. Rosinksi, *Labor Relations in Florida's Public Sector: Visiting the State's Past and Present to Find a Future Solution to the Fight over the Public Purse under Florida's Financial Urgency Statute*, 35 Nova L. Rev. 227 (2010). As the article explains, § 447.4095, Fla. Stat., was created as a vehicle to allow for constitutionally permissible unilateral changes through the financial urgency determination process. The City here had to go through that financial urgency process prior to seeking to change the Ordinances because governmental agencies cannot unilaterally change collective bargaining agreements without running afoul of the Florida Constitution, except under very limited circumstances.

Courts have frequently assumed jurisdiction to protect constitutional rights associated with public employee collective bargaining without requiring exhaustion at PERC of a remedy that, as here, may not even exist. In *Chiles v.*

United Faculty of Florida, 615 So.2d 671 (Fla. 1993), the Supreme Court analyzed the limitations on unilateral modifications to collective bargaining agreements as established in the Florida Constitution. While Article 1, Section 6 was historically recognized as granting governmental employees the fundamental right to collective bargaining,[7] *Chiles* was the first decision to add the Article 1, Section 10 prohibition on impairment of contracts to the analysis. *Id.* at 673 ("The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law"). The Supreme Court held that a collective bargaining agreement is a contract that cannot be impaired by the legislature (and thus similarly by any other governmental entity, including the City Commission) absent a "compelling state interest," which as applied to funding limitations requires a demonstration "that the funds are available from no other possible reasonable source." *Id.* Therefore, post *Chiles*, unilateral modifications of collective bargaining agreements are subject to

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[7] The right to collectively bargain is a fundamental right which may be abridged only for a compelling state interest and, as such, the Ordinances at issue must serve that compelling interest in the least intrusive means possible. *Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Authority*, 522 So.2d 358, 362 (Fla. 1988) ("The right to bargain collectively is, as a part of the state constitution's declaration of rights, a fundamental right. As such it is subject to official abridgement only upon a showing of a compelling state interest. This strict-scrutiny standard is one that is difficult to meet under any circumstance..."); *see also Dade County School Adm'rs Ass'n, Local 77, AFSA, AFL-CIO v. School Bd. of Miami-Dade County*, 840 So.2d 1103, 1104 (Fla. 1st DCA 2003), *citing State Employees Attorneys Guild v. PERC*, 653 So.2d 487, 488 (Fla. 1st DCA 1995).

strict scrutiny to ensure two fundamental constitutional rights, and the historical analysis of Article 1, Section 6 should be viewed in that context.

Furthermore, courts clearly have the judicial authority and responsibility to safeguard constitutional rights, including the right to collectively bargain. *Dade County Classroom Teachers Ass'n, Inc. v. Legislature*, 269 So.2d 684, 686 (Fla. 1972). Yet courts must be mindful of the authority and responsibility of legislative bodies to make the laws that implement the will of the people. To strike this balance, courts have developed the well-established principle of statutory construction that a court should, if it can, interpret a law in a manner that would maintain its constitutionality. *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So.2d 134, 139 (Fla. 2008) ("If possible, the act must be construed "to avoid unconstitutionality and to remove grave doubts on that score.").

Plaintiffs have asked a circuit court in their Amended Complaints to construe the Ordinances as being effective only until September 30, 2012, the date after which the financial urgency determinations made in the Resolutions are no longer effective. PERC lacks subject matter jurisdiction to consider that request. In addition to enabling the Ordinances to be interpreted in a manner that does not render them unconstitutional, by keeping the modifications within those constitutionally-prescribed time limits, obtaining such a circuit court ruling would be consistent with the well-established rule of statutory construction that courts

should adopt an interpretation that harmonizes two related, if conflicting, statutes while giving effect to both. *See, e.g., Jones v. State*, 813 So.2d 22, 25 (Fla. 2002). Such an approach is consistent with another general principle, that pension laws are to be liberally construed in favor of the intended recipients. *Board of Trustees of Town of Lake Park Firefighters' Pension Plan v. Town of Lake Park*, 966 So.2d 448, 451 (Fla. 4th DCA 2007). In allowing a circuit court the opportunity to interpret the Ordinance to have a September 30, 2012, sunset date, this Court would enable the Ordinances to be construed in a manner that does not conflict with these constitutional precepts.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's Order Granting Defendant City's Motion for Partial Summary Judgment and Response to Plaintiffs' Motion for Partial Summary Judgment and remand this action to the trial court for consideration of the parties Motions for Partial Summary Judgment on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 2013, a true and correct copy of the foregoing was sent via electronic mail and U.S. Mail, postage prepaid, to David C. Miller, dmiller@bmolaw.com, and Michael L. Elkins, melkins@bmolaw.com, attorneys for Defendant, City of Hollywood, Florida, Bryant Miller Olive P.A., SunTrust International Center, 1 Southeast 3rd Avenue, Suite 2200, Miami, Florida 33131.

By: /s/Daniel H. Thompson
Daniel H. Thompson

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief is being submitted in Times New Roman 14-point, and otherwise complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: /s/Daniel H. Thompson
Daniel H. Thompson

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