



## City of North Miami Beach Memorandum

**CITY ATTORNEY'S OFFICE**  
Phone: (305) 948-2939  
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**TO:** Honorable Mayor George Vallejo  
Members of the City Commission

**CC:** Ana M. Garcia, City Manager  
Pamela Latimore, City Clerk  
Mr. Frantz Pierre

**FROM:** Jose Smith, City Attorney

**DATE:** January 25, 2018

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**RE:** Charter Section 2.5/Frantz Pierre

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I enclose a Memorandum of Law prepared by Jean Olin, Esq., with which I concur, concerning Frantz Pierre's failure to attend City Commission meetings during the 120 day period beginning on September 18, 2017 through January 16, 2018.

Ms. Olin is a board certified attorney in City, County and Local Government Law and a recognized expert in charter review and revision. Ms. Olin was the City's outside counsel during the City's Charter review process, culminating in the November 8, 2016 election when the residents voted overwhelmingly to approve the existing charter.

It is my recommendation that a Special City Commission meeting be held to discuss how the vacancy will be filled.

JS/mmd

Enclosures

MEMO

To: Jose Smith, City Attorney, City of North Miami Beach  
From: Jean Olin, Esq.  
Re: Commissioner Frantz Pierre--Automatic Vacancy on City Commission per Charter Section 2.5  
Date: January 25, 2018

Pursuant to your request, I have analyzed the issue of North Miami Beach City Commissioner Frantz Pierre's past and continuing nonattendance at City Commission meetings, and the implications of applicable law, including related City Charter and Code provisions. As explained fully below, pursuant to the following language in City Charter section 2.5, Commissioner Pierre's seat on the City Commission became vacant on January 17, 2018 due to the Commissioner's failure to attend any Commission meetings for 120 days:

**...If any Commissioner has failed to attend a meeting of the City Commission for a period of one hundred and twenty (120) days, the seat of such Commissioner shall automatically become vacant.<sup>1</sup>**

**I. FACTUAL BACKGROUND.**

Since January of 2017 City Commissioner Pierre has, primarily due to medical reasons, been absent from 12 of the 17 City Commission meetings.<sup>2</sup> Of the 12 Commission meetings that Commissioner

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<sup>1</sup> City Charter section 2.5 reads in its entirety as follows: "A quorum of the City Commission at any regular or special meeting shall consist of five members. Except as otherwise provided herein, the affirmative vote of a majority of the quorum present shall be required upon any matter submitted for consideration of the Commission. If any Commissioner has failed to attend a meeting of the City Commission for a period of one hundred and twenty (120) days, the seat of such Commissioner shall automatically become vacant."

(Note: In the recent case of *Sanchez v. Lopez*, 219 So.3d 156 (Fla. 3DCA 2017), the Florida Third District Court of Appeal confirmed in dicta that city charter provisions providing for removal of elected officials due to excessive absenteeism are lawful.)

<sup>2</sup> Pursuant to City Clerk examination of City Commission Meeting attendance records for the past 12 months, the following schedule reflects Commissioner Pierre's attendance record:

- 01/17/17 Regular Commission Meeting--attended.
- 02/21/17 Regular Commission Meeting--attended.
- 03/21/17 Regular Commission Meeting--attended.
- 04/03/17 Special Commission Meeting-- attended.
- 04/18/17 Regular Commission Meeting--absent.
- 05/16/17 Regular Commission Meeting--absent.
- 06/08/17 Special Commission Meeting-- absent/participated by telephone.
- 06/20/17 Regular Commission Meeting--absent/participated by telephone.
- 07/18/17 Regular Commission Meeting--absent/participated by telephone.
- 08/15/17 Regular Commission Meeting--absent/participated by telephone.
- 08/24/17 Regular Commission Meeting after CRA Board Meeting--attended.
- 09/18/17 First Public Budget Hearing/Regular Commission Meeting--absent.

Pierre did not attend, he instead participated in 7 of them via telephone conference (as authorized by Florida's Government in the Sunshine Law, Florida Statute section 286.011, explained more fully below). Notably, Commissioner Pierre's attendance record further reveals that as of January 17, 2018 he has not attended Commission meetings for 120 days, thus invoking City Charter section 2.5 which expressly provides that in such instance "...the seat of such Commissioner shall automatically become vacant". *Id.*

## II. MEMORANDUM OF LAW.

By way of introduction, cities in the State of Florida have been granted broad home rule powers by section 2(b), Article VIII, State Constitution, as implemented by s. 166.021, Fla. Stat. Thus, a City may exercise its power to carry on City government, unless the Legislature has preempted a particular subject or otherwise regulates the area. See *Speer v. Olson*, 367 So.2d 207, 211 (Fla. 1978). There is no provision of general or special law which would preempt to the State the subject of regulating the attendance of meetings by City commissioners, or the automatic removal of such Commission members due to their nonattendance. Thus, in the exercise of its home rule powers and in light of the provisions of s. 166.021 authorizing the legislative and governing body of the City to establish rules of procedure, the City lawfully established rules for the attendance of City Commission meetings by its members, including the procedure for automatic removal of a Commission member for failure to attend Commission meetings over a specified period of time. The following analysis sets forth these City laws and their implications.

### A. City Charter Section 2.5 Controls.

A municipal charter is the paramount law of the municipality, just as the state constitution is the charter for the State. See, e.g., *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 803 (Fla. 1972); *Clark v. North Bay Village*, 54 So. 2d 240, 242 (Fla. 1951); and see, Op. Att'y Gen. Fla. 82-101 (1982). Cf. *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 609 (Fla. 4th DCA 1983), *review denied*, 440 So. 2d 352 (Fla. 1983). City of North Miami Beach Charter section 2.5, governing the attendance/removal of Commission members, is thus the applicable Charter provision in the subject issue.

#### 1) Section 2.5's plain/ordinary meaning requires physical presence.

As a general rule, where the language of a particular law is clear and amenable to a reasonable and logical interpretation, that interpretation will control, as courts and other governmental bodies are without

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- 09/25/17 Second Public Budget Hearing--absent/participated by telephone.
  - 10/17/17 Regular Commission Meeting-- absent.
  - 11/14/17 Regular Commission Meeting-- absent.
  - 12/19/17 Regular Commission Meeting-- absent/participated by telephone.
  - 01/16/18 Regular Commission Meeting-- absent/participated by telephone

power to diverge from the intent of the Legislature as expressed in the law's plain language.<sup>3</sup> See *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064 (Fla.1995); *Lee County Elec. Coop., Inc. v. Jacobs*, 820 So.2d 297, 303 (Fla.2002).

The language in City Charter section 2.5 clearly and expressly provides for an automatic vacancy in office upon a City Commissioner's failure to "attend" Commission meetings for 120 days. Further, as written, a City Commissioner's failure to "attend" Commission meetings for the stated 120 days imposes upon the City a mandatory, non-discretionary vacancy in the subject Commission seat. Inasmuch as the plain and ordinary meaning of a word may be ascertained by reference to a dictionary (See, *L.B. v. State*, 700 So.2d 370 (Fla.1997); *Green v. State*, 604 So.2d 471, 473 (Fla.1992)), the word "attend" in Charter section 2.5 sets forth the requirement that a Commission member "be present" at a Commission meeting. See <https://www.merriam-webster.com/dictionary/attend>, and <http://www.dictionary.com/browse/attend>. And see, <http://www.dictionary.com/browse/present> defining "present" as "being with one or others in the specified or understood place", and <https://www.merriam-webster.com/dictionary/present> "present" defined as "being in one place and not elsewhere".

Since the Charter language is not ambiguous, it must be interpreted per its plain meaning, requiring that Commission members not be physically absent from Commission meetings for the stated 120-day period. See, *Spence-Jones v. Dunn*, 118 So.3d 261, 262 (Fla. 3DCA 2013): "The sole issue is a question of statutory interpretation. We find no ambiguity in the charter provision. As such, we are required to interpret it according to its plain meaning. *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071, 1073 (Fla.1982)".

## 2) Statutory construction supports plain meaning of Charter section 2.5.

In light of the above, there is no need for a statutory construction analysis of Charter section 2.5. "When a statute is clear, we do not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Lee County Elec. Coop., Inc. v. Jacobs*, 820 So.2d 297, 303 (Fla.2002). Nonetheless, even were we to assume that the Charter language is ambiguous, applicable theories of statutory construction affirm that the term "attend" in Charter section 2.5 refers to the physical presence of all Commission members.<sup>4</sup>

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<sup>3</sup> As a fundamental principle of statutory construction, "legislative intent is the polestar that guides a Court's inquiry." *State v. Rife*, 789 So.2d 288, 292 (Fla.2001) (quoting *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla.1998)).

<sup>4</sup> Note: The attendance requirement in Charter section 2.5 applies to "any Commissioner", and is not otherwise limited to "the quorum present". If the City intended that only the quorum be present it would have said so, but instead Charter 2.5's attendance requirement was drafted to apply to all members of the City's governing body. See *Johnson v. Feder*, 485 So.2d 409, 411 (Fla. 1986) ("We are compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.'" (quoting *Patagonia Corp. v. Bd. Of Governors of the Fed. Reserve Sys.*, 519 F. 2d 803, 813 (9<sup>th</sup> Cir. 1975))).

a) Related City laws. The Florida Supreme Court has noted that: “Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.” *Knowles v. Beverly Enterprises—Florida, Inc.*, 898 So. 2d 1 (Fla. 2004). Reading Charter section 2.5 together with the following related City Charter and Code provisions governing attendance requirements of certain City officers, confirm that the term “attend” is designed to impose a requirement for an officer’s physical presence at a public meeting:

- Charter Section 3.3.1 “Powers and Duties of the City Attorney”: “The City Attorney shall...attend all meetings of the City Commission. ...”.
- Charter Section 3.1.1 “Powers and Duties of the City Manager”: “The City Manager shall...attend all meetings of the City Commission and of its committees...”.
- Code Section 2-4.1 “City Clerk’s Duties and Responsibilities; Exclusions”: “The City Clerk of the City of North Miami Beach or the Clerk’s authorized designee shall attend all regular and special meetings of the City Commission and any other meetings as requested by the City Commission. ...”.
- Code Section 2-67.6 “Planning and Zoning Board: Failure to Attend Meetings”: “If any member fails to attend two (2) of three (3) consecutive regular or special meetings...”.<sup>5</sup>

A basic tenet of statutory construction requires that laws be interpreted so as to avoid unreasonable or absurd consequences. *See Thompson v. State*, 695 So.2d 691, 693 (Fla.1997); *State v. Hamilton*, 660 So.2d 1038, 1045 (Fla.1995). Clearly, it would be absurd to infer an intent on behalf of the City that the above attendance requirements meant anything other than physical presence.

b) City Code section 2-1.1. Finally, and perhaps as significant to the issue of a Commission member’s attendance at Commission meetings, is City Code Section 2-1.1, reflecting the most recent pronouncement by the City Commission concerning Commission members’ attendance at Commission meetings.<sup>6</sup> Although the premise for Code section 2-1.1(a) is different than that addressed in Charter section 2.5 (in that the Code section concerns Commission members who are in attendance at a Commission meeting, requiring that they remain there throughout the meeting’s entirety, absent an emergency/matter beyond their control), the legislative intent expressed for the Code section is relevant

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<sup>5</sup> Florida courts generally will defer to an agency’s interpretation of statutes and rules the agency is charged with implementing and enforcing. *See Donato v. American Tel. & Tel. Co.*, 767 So.2d 1146, 1153 (Fla.2000); *Smith v. Crawford*, 645 So.2d 513, 521 (Fla. 1st DCA 1994). Significantly, the City has in the past interpreted its above Charter as requiring one’s physical presence (see, Exhibit "A" attached hereto, email from City Clerk Pam Latimore, regarding removal of Planning and Zoning Board Member due to nonattendance), further supporting that Charter section 2.5 requires Commission members not be physically absent from Commission meetings for the stated 120 days.

<sup>6</sup> See, City Ordinance 2016-9, adopted by the Commission on October 4, 2016.

to the absenteeism provisions of Charter section 2.5:

WHEREAS, Florida Statute section 286.012 (Florida's "Government in the Sunshine" law) specifically provides that members of governmental bodies are required to perform their responsibilities by participating in decisions to be made by such bodies. *Clearly, a member of a governmental body, such as the North Miami Beach City Council, is expected to attend and remain at meetings of the City Council, barring a situation in which that member's presence is unexpectedly required elsewhere;*

WHEREAS, allowing without restriction a City Councilmember to leave Council meetings prior to its completion of business *effectively grants to such Councilmember the means of frustrating official action by merely refusing to remain at a Council meeting, which actions the City Council deems to be inconsistent with a Councilmember's official duties and contrary to the Oath of Office as stated in Section 8 of the City Charter (" ... to well and faithfully perform ... their duties ... ");*

WHEREAS, within the past several months, certain Councilmembers have left Council meetings before the Council's completion of agenda items, necessitating either the postponement and rescheduling of time-sensitive items for future Council meetings or the need for meeting adjournment pending the Council's ability to obtain a quorum, *both situations serving to obstruct and impede good, responsive government in the City of North Miami Beach.*

\* \* \*

City Ordinance 2016-9. (Emphasis added.) Regardless of whether a Commission member has attended a Commission meeting and left prior to its completion, or simply not attended at all, the above concerns regarding "frustrating official action" due to a Commission member's absence as "inconsistent with a Councilmember's official duties and contrary to the Oath of Office..." serve to reveal the City Commission's ongoing intent that its members are to be present at Commission meetings.

B. Commissioner Pierre's Telephonic Participation not "Attendance" per Charter Section 2.5.

As discussed above, the City Charter provides that failure of a Commission member to attend (i.e., be physically present) a Commission meeting for a period of 120 days will result in the automatic vacancy of such Commission member. During the subject 120-day period in which he did not physically attend the meetings, Commissioner Pierre participated via telephone in 3 of those meetings.<sup>7</sup> The Commissioner's telephonic participation, although lawful under the State's Sunshine Law, did not satisfy his duty to comply with Charter section 2.5's attendance requirement.

The State's Government-in-the-Sunshine Law<sup>8</sup> requires any meeting of two or more members of the City Commission to meet in public when discussing matters that will foreseeably require official action of the Commission. Although a quorum of the City Commission must be present at any meeting in order

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<sup>7</sup> See footnote #2 above.

<sup>8</sup> Fla. Stat. sec. 286.011.

for official action to be taken<sup>9</sup>, numerous opinions of the State’s Attorney General have held that a member of the Commission who is unable to attend a public meeting due to medical issues may participate via telephone so long as a quorum of the Commission is otherwise present at the meeting.<sup>10</sup> Due to Commissioner Pierre’s medical condition and his stated inability to attend Commission meetings, he was permitted to participate in Commission meetings by telephone.

Telephonic participation however does not equate to “attendance”, and none of the Attorney General Opinions condoning such participation have conferred “present” status to absent, nonattending members of a governmental Commission, board or committee. Rather, the Attorney General’s opinions have clearly distinguished “attendance” from “participation”. See, Op. Att’y Gen. Fla. 2002-82:

“...physically disabled members of the City of Miami Beach Barrier-free Environment Committee *may participate and vote on board matters by electronic means if they are unable to attend a public meeting* so long as a quorum of the members of the board is physically present at the meeting site.”

### **III. CONCLUSION.**

Based upon the above analysis, it is my opinion that pursuant to City Charter section 2.5, Commissioner Frantz Pierre’s seat on the City Commission has been vacant as of January 17, 2018 due to the Commissioner’s failure to attend a Commission meeting for 120 days. In view of the Charter’s language providing for such “automatic” vacancy, this issue of vacancy is mandatory and not subject to the discretion of the City Commission. As such, the provisions of City Charter section 4.5 governing vacancies on the City Commission must forthwith be complied with by the City Commission for purposes of filling the vacancy in the subject City Commission Group 5.

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<sup>9</sup> See, City Charter sec. 2.5 “...Except as otherwise provided herein, the affirmative vote of a majority of the quorum present shall be required upon any matter submitted for consideration of the Commission....”; and see, Fla. Stat. sec.166.041(4): “An affirmative vote of a majority of a quorum present is necessary to enact any ordinance or adopt any resolution”; and see, Op. Att’y Gen. Fla. 09-56 (2009): “[W]here a quorum is necessary for action to be taken, physical presence of the members making up the quorum is required in the absence of a statute requiring otherwise.”

<sup>10</sup> See, Inf. Op. Att’y Gen. Fla. July 20, 2016: “...if a quorum of a local board is physically present, ‘the participation of an absent member by telephone conference or other interactive electronic technology is permissible when such absence is due to extraordinary circumstances such as illness[.]’”; “... if a quorum of a local board is physically present at the public meeting site, a board may allow a member with health problems to participate and vote in board meetings through the use of such devices as a speaker telephone that allow the absent member to participate in discussions, to be heard by other board members and the public and to hear discussions taking place during the meeting.” Op. Att’y Gen. Fla 03-41; Op. Att’y Gen. Fla 92-44 (participation and voting by ill county commissioner), and Op. Att’y Gen. Fla 02-82 (physically-disabled city committee members participating and voting by electronic means).

From: **Latimore, Pamela** Pamela.Latimore@citynmb.com  
 Subject: FW: P&Z applicants  
 Date: January 23, 2018 at 5:34 PM  
 To: jean olin jeanolin.munilaw@gmail.com  
 Cc: Smith, Jose Jose.Smith@citynmb.com

Attached is an email that was sent to the appointing Commissioner concerning Mr. Marrero's removal from P&Z due to absences.

**From:** Latimore, Pamela  
**Sent:** Tuesday, October 17, 2017 7:47 PM  
**To:** Bernard, Andrise <Andrise.Bernard@citynmb.com>  
**Subject:** FW: P&Z applicants

**Pamela L. Latimore, CMC**  
 City Clerk  
 Office of the City Clerk  
 17011 N.E. 19th Ave.  
 North Miami Beach, Fl. 33162  
 (305) 787-6001 (305) 787-6026 (fax)  
[pamela.latimore@citynmb.com](mailto:pamela.latimore@citynmb.com)

Florida Association of City Clerks/ President Elect  
[www.Floridaclerks.org](http://www.Floridaclerks.org)



" Promoting and Developing the Educational and Professional Status of Florida City Clerks"

**From:** Latimore, Pamela  
**Sent:** Tuesday, February 14, 2017 11:33 AM  
**To:** Spiegel, Beth <[beth.spiegel@citynmb.com](mailto:beth.spiegel@citynmb.com)>  
**Cc:** Bernard, Andrise <[Andrise.Bernard@citynmb.com](mailto:Andrise.Bernard@citynmb.com)>  
**Subject:** P&Z applicants

**Attached are applications for possible appointment to the P&Z Board.  
 There are 2 openings for appointment.**

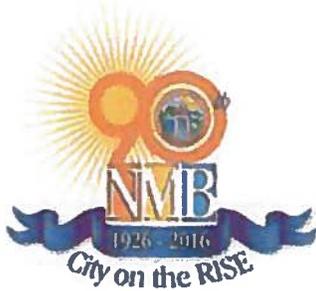
**Mayor Vallejo – Appointee Jerrat Gross- resignation**  
**Commissioner Spiegel – Appointee Hector Marrero- removal due to absences.**

**Pamela L. Latimore, CMC**  
 Florida Association of City Clerks/ Vice President  
[www.Floridaclerks.org](http://www.Floridaclerks.org)

City Clerk  
Office of the City Clerk  
17011 N.E. 19th Ave.  
North Miami Beach, Fl. 33162  
(305) 787-6001 (305) 787-6026 (fax)  
[pamela.latimore@citynmb.com](mailto:pamela.latimore@citynmb.com)



" Promoting and Developing the Educational and Professional Status of Florida City Clerks"



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Richard Weiner  
021417.pdf



Russell Lazega  
020117.pdf



Jose Ramos  
081216.pdf



Kristina Wilson  
110315.pdf



Vladimir A  
Bugera...15.pdf

From: **Latimore, Pamela** Pamela.Latimore@citynmb.com  
Subject: FW: 20180122141350.pdf  
Date: January 22, 2018 at 4:34 PM  
To: jean olin jeanolin.munilaw@gmail.com

PL

This member was removed from P and Z due to attendance issue.

**From:** Bernard, Andrise  
**Sent:** Monday, January 22, 2018 4:27 PM  
**To:** Latimore, Pamela <Pamela.Latimore@citynmb.com>  
**Subject:** 20180122141350.pdf



PLEASE NOTE: The City of North Miami Beach is a public entity subject to Chapter 119 of the Florida Statutes concerning public records. E-mail messages are covered under such laws and thus subject to disclosure. All e-mail sent and received is captured by our servers and kept as public record.



Office of the City Clerk

January 09, 2017

Mr. Hector Marrero  
3440 NE 164<sup>th</sup> Street  
North Miami Beach, Florida 33179

Dear Mr. Marrero:

On December 12, 2016, the Mayor and City Council passed Ordinance No. 2012-28 and as a result your term as a member of the Planning and Zoning Board will concluded as of December 12, 2016. On behalf of the Mayor and City Council of the City of North Miami Beach, I would like to thank you for the time and effort you have devoted to serving on the Planning and Zoning Board throughout the years. If you would like to re-apply to be considered for future board or committee vacancies, please complete the attached application and return it to the City Clerk's Office.

Please be advised that as your term has ended, and if you are not reappointed, you are required by Florida Statutes to file a Form IF (Final Statement of Financial Interests Form) within 60 days of receiving this

letter. Enclosed is a blank form with instructions which must be mailed to the Miami-Dade County Elections Department, Financial Disclosure Division, 2700 N.W. 87 Avenue, Doral, Florida 33172.

We sincerely appreciate you having served on the Planning and Zoning Board we hope that you will continue to stay active and play a supportive role in your community.

Sincerely,



Pamela L. Latimord, CMC  
City Clerk

C: Anthony DeFillipo, Commission Liaison  
Richard Lorber, Staff Liaison

Enclosures