

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CIRCUIT CIVIL DIVISION

JAY R. CHERNOFF,

CASE NO.: **2023-2633 CA (01)**

Plaintiff,

vs.

**CITY OF NORTH MIAMI BEACH,
COMMISSIONER MICHAEL JOSEPH, and
COMMISSIONER MCKENZIE FLEURIMOND,**

Defendants.

**CITY OF NORTH MIAMI BEACH'S RESPONSE
TO EMERGENCY MOTION FOR INJUNCTIVE RELIEF**

The City of North Miami Beach (the "City") files this Response to the Verified Emergency Motion for Injunctive Relief (Doc. 58) filed by Defendants and Counter-Plaintiffs Commissioner Michael Joseph and Commissioner McKenzie Fleurimond. The Motion seeks to enjoin the City Commission from holding a vote at its May 2023 meeting as to whether Commissioners Joseph and Fleurimond vacated their seats due to lack of attendance in violation of Section 2.5 of the City's Charter. The Court should deny this Motion because:

- (a) Defendants have maintained that the proper venue for addressing this dispute is at a City Commission meeting, rather than through judicial intervention;
- (b) Addressing the attendance issue at a City Commission meeting is consistent with the Commission's prior process under the *Pierre* precedent; and
- (c) It would be improper for the judiciary to intervene prior to the Commission taking any action at this meeting, attendance at which is required for Commissioners Joseph and Fleurimond to exhaust their administrative remedies.

Argument and Authorities

A. Commissioner Joseph (and presumptively Commissioner Fleurimond) has maintained that, under the *Pierre* precedent, the issue of attendance must be addressed by the City Commission, rather than this Court.

In his affirmative defenses and argument before this Court, Commissioner Joseph has maintained that the appropriate process for addressing whether he violated Section 2.5 of the City’s Charter and vacated his seat is through a City Commission meeting, rather than judicial intervention. *See* Commissioner Joseph’s Answer and Affirmative Defenses (Doc. 49) (Affirmative Defenses Nos. 3, 5, 6, 7, and 11). Commissioner Joseph contends that, before filing this lawsuit, Commissioner Chernoff “was obligated to at least attempt to schedule a Special Commission Meeting and provide an opportunity for the allegedly offending elected officials to speak and present rebuttal at that meeting before seeking relief in this Court,” and the failure to schedule or conduct such a meeting is a complete defense to this lawsuit. *Id.* at p. 5-6 (Sixth Affirmative Defense).

According to Commissioner Joseph, “due process should be provided in the form of notice of a Special Commission Meeting and an opportunity for the allegedly offending elected official to speak and present rebuttal at that meeting.” *Id.* at p. 5 (Fifth Affirmative Defense). He further argues that the Commission is bound to follow the *Pierre* precedent and afford him procedural due process at such a meeting:

In keeping with Florida law governing the property rights of public officials, the *Pierre* precedent upholds due process by providing notice and a hearing at a Special Commission Meeting for any Commissioner to address allegations of attendance issues. The same result is warranted here. Instead of seeking relief in the courts, Plaintiff should follow City precedent and afford due process to Vice Mayor Joseph and Commissioner Fleurimond. Since an adequate remedy and process exists, this Court should give deference to the internal political process of this separate branch of government.

Doc. 49 at p. 5 (Fifth Affirmative Defense).

Under the *Pierre* precedent, the Commission provided procedural due process to a prior Commissioner, Frantz Pierre, who likewise faced a vacancy of his commission seat under Section 2.5 of the City Charter due to attendance issues. The *Pierre* precedent is outlined in a memorandum of law prepared by Jean Olin, Esq. and provided to Jose Smith, Esq., a prior City Attorney. See Exhibit “A.” Consistent with Commissioner Joseph’s position, under the *Pierre* precedent, the Commission offered Commissioner Pierre and his counsel the opportunity to be heard and participate at a Commission meeting. See Special Commission Meeting Minutes for February 5, 2018, meeting concerning whether Commissioner Pierre vacated his seat, attached as Exhibit “B.”

B. Judicial intervention prior to the meeting would be improper.

Commissioners Joseph and Fleurimond request that this Court engage in prior judicial restraint to prevent this meeting and vote, arguing that the result of any Commission vote will likely result in a vacancy of their seats. However, no such vote has taken place. Until this vote occurs, it would be premature for the judiciary to intervene. See *Wilderness Society v. Alcock*, 83 F.3d 386, 390 (11th Cir. 1996) (explaining that the ripeness doctrine “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies” and “protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”) (citation omitted).

As Commissioner Joseph has pointed out, under the *Pierre* precedent his administrative remedy is to seek procedural due process at a City Commission meeting. See *Browne v. City of Miami*, 948 So. 2d 792, 793 (Fla. 3d DCA 2007) (“A party is required to exhaust administrative remedies prior to turning to the circuit court for relief.”). Accordingly, the time for judicial

intervention is only after the City Commission engages in a discussion and vote on this matter, not before.

Conclusion

The City has scheduled a Special Meeting to putatively occur on May 16, 2023. At this meeting, Commissioners Joseph and Fleurimond (and their counsel) will each have the opportunity to plead their case in the same manner that Commissioner Pierre did. Now that the Commission has set the meeting that he requested, Commissioner Joseph and Fleurimond seek to tie the Commissions' hands and enjoin them from discussing or voting on their attendance issues.

It is the City's position, consistent with the arguments raised by Commissioner Joseph and Fleurimond, that this dispute is not ripe for judicial review or intervention until after this meeting is held and the Commission acts. If Commissioners Joseph or Fleurimond wish to challenge the procedure, the Commission's application of Section 2.5 of the Charter, the basis or outcome of the vote, or any other matter, they may do so after the meeting is held and prior to any vacancy being filled. If, on the other hand, this Court grants the Motion and enjoins the Commission from holding such a meeting, then the Court should strike Commissioner Joseph's affirmative defenses related to due process and the *Pierre* precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via the Florida e-portal to all counsel of record on this 5th day of May, 2023.

/s/ Victor Sanabria
Victor G. Sanabria.

EXHIBIT A



City of North Miami Beach Memorandum

CITY ATTORNEY'S OFFICE
Phone: (305) 948-2939
Fax: (305) 787-6004

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

RE: Charter Section 2.5/Frantz Pierre

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.¹

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.² Of the 12 Commission meetings that Commissioner

¹ 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.)

² 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.³ 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.⁴

³ 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)).

⁴ 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 (9th 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...”.⁵

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.⁶ 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

⁵ 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.

⁶ 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.⁷ 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 Law⁸ 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

⁷ See footnote #2 above.

⁸ Fla. Stat. sec. 286.011.

for official action to be taken⁹, 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.¹⁰ 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.

⁹ 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.”

¹⁰ 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).

EXHIBIT B



CITY OF NORTH MIAMI BEACH
City Commission Special Meeting
City Hall, Commission Chambers, 2nd Floor
17011 N.E. 19th Avenue
North Miami Beach, FL. 33162
Monday, February 5, 2018
5:00pm

Mayor George Vallejo
Vice Mayor Beth E. Spiegel
Commissioner Anthony F. DeFillipo
Commissioner Barbara Kramer
Commissioner Marlen Martell
Commissioner Phyllis S. Smith

City Manager Ana M. Garcia, ICMA-CM
City Attorney Jose Smith
City Clerk Pamela L. Latimore, CMC

Special Commission Meeting Minutes

ROLL CALL OF THE CITY OFFICIALS

The meeting was called to order at 5:05pm. Present at the meeting were Mayor George Vallejo, Vice Mayor Beth E. Spiegel, Commissioner Anthony F. DeFillipo, Commissioner Barbara Kramer, Commissioner Marlen Martell, and Commissioner Phyllis S. Smith. City Manager Ana M. Garcia, City Attorney Jose Smith, and City Clerk Pamela L. Latimore were also present.

PLEDGE OF ALLEGIANCE was led by the Mayor and Commission.

Mayor Vallejo announced that a legal opinion regarding the vacancy of Frantz Pierre's Commission Seat #5 will be presented.

City Attorney Jose Smith expressed that Section 2.5 of the City Charter states that if any Commissioner has failed to attend a meeting of the City Commission for a period of hundred and twenty (120) days, the seat of such Commissioner shall automatically become vacant and provided a chronology of events that led to the vacancy issue and legal opinion. City Attorney Smith stated that the one hundred and twenty (120) day period expired at midnight on January 17, 2018 and the Commission seat of Frantz Pierre became automatically vacant and the City Commission will discuss the process of filling the vacancy under the City Charter.

Outside Counsel Jean Olin discussed her legal opinion and stated that Section 2.5 of the City Charter was analyzed and the language is worded to impose a mandatory non-discretionary duty upon members of the City Commission to recognize that if a member of the Commission fails to attend a Commission meeting for one hundred and twenty (120) days there is an automatic vacancy. Outside Counsel Jean Olin stated that the basis for the opinion is primarily the interpretation of the language in the City Charter and explained that the municipal home rule powers enable the City of North Miami Beach to legislate on any matter as long as the subject has not been preempted. Outside Counsel Jean Olin confirmed that the City of North Miami Beach has never been preempted on the matters of declaring required attendance and the removal of a member of the City

Commission and discussed Section 4.5 of the City Charter which establishes the process of filling a vacant Commission seat.

City Attorney Smith stated that during the charter review process in 2016, the Charter Review Committee proposed and recommended to include a good cause provision with procedures to remove an elected official similar to other cities and the Mayor and Commission chose not to adopt it and has no discretion at this time to find a due process or good cause requirement.

Mayor Vallejo opened the meeting for **PUBLIC COMMENT**.

City Clerk Latimore read the rules of public comment into the record and the following person(s) made comments on the record:

1. Norman Edwards - 1640 N.E. 175th St., North Miami Beach, FL.
2. Marilyn Baumoehl - 18635 N.E. 20th Ct., North Miami Beach, FL.
3. Muriel Kemp - 1479 N.E. 178th St., North Miami Beach, FL.
4. Mubarak Kazan
5. Michele Decayette - 1000 N.E. 151st Ter., North Miami Beach, FL.

The meeting was closed for **PUBLIC COMMENT**.

Outside Counsel Jean Olin provided an explanation regarding the plain and ordinary meaning definition of the word 'attend' in Section 2.5 of the City Charter and stated that there is no special election required in order to fill this vacancy per Section 4.5 of the City Charter because there will be a general election in November of 2018 and the Mayor and Commission has a duty to appoint an individual to fill the vacant Commission seat pending the general election.

The Mayor and Commission discussed a letter that was received from Benedict Kuehne, legal representative of Frantz Pierre, and City Attorney Smith stated that Mr. Kuehne asked the City to note his objection to this meeting and requested that it be made part of the record.

Commissioner Kramer asked if Commissioner Pierre contacted City staff about his inability to attend Commission meetings for an extended period of time and asked if a City staff member contacted Mr. Pierre regarding a possible automatic vacancy of office and asked if a decision of the City Commission regarding this matter could overrule the City Charter. City Attorney Smith stated that Mr. Pierre was never advised that participating by telephone was tantamount to attending Commission meetings and he was aware of the one hundred and twenty (120) day requirement.

The following is a transcript from the meeting that occurred between the timeframe of 50:36 and 53:37.

City Attorney Jose Smith: Now the question may come up, did anyone call him to let him know that the time was about to expire? I don't think it would have made any difference because I have a letter from his physician that was filed in the context of a federal lawsuit where his physician told the federal judge that he could not participate in the federal proceedings starting in January for at least three months, so it would not have mattered. The time would have run out and he would not have been here anyway and we only found out about

this after your (Commissioner Kramer) email, so we could not possibly have given him a heads up because we didn't even know ourselves that the time had run out.

Mayor George Vallejo: Can I just do something real quick because let me just get straight just very quick answers because the questions were: Did Commissioner Pierre ever ask? Did anyone ever call him? Does the Charter overrule or, I'm sorry, can the City Commission overrule what the Charter says? So let's take the easy one first, the first legal question. Can the Commission overrule what the Charter says in this matter?

City Attorney Jose Smith: No.

Mayor Vallejo: Now the question obviously is did Commissioner Pierre ever ask anyone? I'm assuming there is only three people that a Commissioner should be talking to which is the three of you here (the Charter officers), so we can very quickly get that on the record. Did Commissioner Pierre ever call any of you to ask that question?

City Clerk Pamela L. Latimore: Commissioner Pierre did not contact me directly. His wife contacted my office via my assistant, I want to say a week or two weeks ago asking about sending some form of letter about his absence and wanting me to make an interpretation of the Charter. I, via through my assistant, on the phone, on the speakerphone, told his wife that they needed to contact the City Attorney's Office to get an interpretation of the Charter. I was not going to do that and that has been my contact with the Commissioner on this matter.

City Attorney Jose Smith: And he did not call me or anybody in my staff.

City Manager Ana M. Garcia: To put it on the record clearly, the Chief Administrative Officer of the City has a multitude of responsibilities and one of which is not the interpretation of the Charter in regards to attendance. I do deal with each and every one of you, including Commissioner Pierre, in good faith at all times and I had no clue that his participating by phone did not constitute.

Mayor Vallejo: Did he call you to ask you any questions?

City Manager Ana M. Garcia: No.

Mayor Vallejo: So obviously I can take it then no one obviously by the answers I'm hearing called Commissioner Pierre to say anything about this.

The above transcript from the meeting occurred between the timeframe of 50:36 and 53:37.

Mayor Vallejo asked whether or not the three Charter Officers or the members of the Commission had a legal responsibility to contact Mr. Pierre and City Attorney Smith replied no and stated that each individual Commissioner is primarily responsible for monitoring their own attendance and compliance.

Vice Mayor Spiegel asked if the Mayor and Commission were sitting at this meeting in a quasi-judicial or legislative capacity and City Attorney Smith stated that it was an obligation to advise the Mayor and Commission of the legal conclusion and thought providing due process was good practice even though it's not

required regarding this matter. City Attorney Smith discussed the role of the Mayor and Commission in the formal selection process of filling the vacant seat and said the meeting was for informational purposes and not quasi-judicial. Vice Mayor Spiegel asked about a due process requirement and City Attorney Smith stated that having this meeting is in an abundance of caution to allow Mr. Pierre and his representative the opportunity to participate. Vice Mayor Spiegel asked if the word 'attend' is defined in the City Charter and City Attorney Smith replied that it is not in the Charter or the City Code.

Commissioner Smith raised a point of order for the letter that was received from Benedict Kuehne, legal representative of Frantz Pierre, to be read into the record and she proceeded to read the letter. Commissioner Smith asked whether or not Mr. Pierre could sue the Mayor and Commissioners individually and City Attorney Smith replied that they would have no liability and the City would defend them. Mayor Vallejo stated that the only legal opinion that matters to the City is from the City Attorney.

Commissioner DeFillipo expressed that this is an unfortunate situation, but stated that it is the responsibility of the Mayor and Commission to uphold the City Charter.

Commissioner Martell inquired about Mr. Pierre being notified of this meeting and City Attorney Smith stated that the notice was emailed and hand-delivered to him.

Mayor Vallejo confirmed that this matter is a violation of the City Charter and asked if any of his colleagues wanted to challenge and override the decision of the City Attorney and nobody on the dais questioned the legal position. Mayor Vallejo stated that the City Charter must be followed to fill the vacant Commission seat and expressed that he feels for Mr. Pierre and wished him well.

Commissioner Smith asked about the issues of sickness and disability regarding this matter and Outside Counsel David Miller stated that he researched statutes dealing with illnesses and concluded that there is no application of those laws under these circumstances.

City Attorney Smith read a portion of Section 4.5 of the City Charter that states vacancies in elective offices of the City of North Miami Beach shall be filled by the City Commission pending the next general election, at which time an election to fill the vacancy shall be held for any remainder of the unexpired term. Outside Counsel Jean Olin stated that Section 4.5 of the City Charter does not define the time period by which the Mayor and Commission must appoint someone to fill the vacancy and recommended that it should be within a reasonable period of time. Outside Counsel Jean Olin stated that the other relevant section(s) of the Charter and City Code that need to be considered for appointment are the qualifications for elected office.

Vice Mayor Spiegel stated that a recent similar situation occurred in North Bay Village and suggested that the City of North Miami Beach should advertise and ask all who have an interest in serving to submit a letter of interest and then schedule a meeting to discuss and consider the individuals. Vice Mayor Spiegel discussed the process that took place the last time a Commission seat was vacated in the City of North Miami Beach.

Commissioner DeFillipo stated that this special meeting was advertised in the newspaper and City Clerk Latimore confirmed that the notice was published in the Daily Business Review and the Miami Herald.

Commissioner DeFillipo expressed that due process was put into effect and the proper procedures were followed and discussed the merits of Ketley Joachim.

Motion to nominate Ketley Joachim for appointment to the City Commission made by Commissioner DeFillipo, seconded by Mayor Vallejo.

Commissioner DeFillipo expressed his support for Ketley Joachim and mentioned events and causes that she has participated and been involved in over the years in the City of North Miami Beach. Commissioner Smith, Commissioner Kramer, Commissioner Martell, and Vice Mayor Spiegel discussed filling the vacant Commission seat and expressed that they were not in support of the motion at this time. Mayor Vallejo stated that he was in favor of the motion, but due to a lack of support from the majority of the Commission, he gave Commissioner DeFillipo the opportunity to withdraw his motion and the motion and the second were withdrawn.

The Mayor and Commission discussed the process and procedure of filling the vacant Commission seat and the required qualifications, the selection process and time frame, conducting criminal background checks, and scheduling and advertising the meeting at which the appointment will be considered.

Motion to create a process to fill the vacant Commission seat that would involve all interested individuals submitting a letter of interest and qualifying information to the Office of the City Clerk by February 16, 2018 at 12:00pm, having each Commissioner meet with the interested individuals at their discretion, and scheduling and advertising a Commission Meeting for February 22, 2018 to make a decision made by Commissioner Smith, seconded by Vice Mayor Spiegel.

MOTION PASSED 5-1 with Commissioner DeFillipo opposed.

Commissioner Smith stated that she was prepared to recommend and nominate William Dean for appointment to the City Commission, but she wanted to discuss the process of filling the vacant Commission seat.

Vice Mayor Spiegel invited everyone to attend the Valentine's Day Love-In event on February 14, 2018.

ADJOURNMENT

There being no further business to come before the City Commission, the meeting was adjourned at 7:39pm.

ATTEST:

(SEAL)



Pamela L. Latimore, CMC, City Clerk