MEMORANDUM

To: **City Council Members**
Mayor Donna Deegan

From: **Michael T. Fackler, General Counsel** Michael Fackler

Re: **Legal Memo on Ordinance 2024-800 (the "Ordinance")**

Date: **January 10, 2025**

We were informed that the Mayor is considering a veto to an ordinance asserting a violation of the separation of powers under the Charter for the Consolidated City of Jacksonville (the "Charter"). We have drafted this memo, not in response to a specific question posed by any of our clients, but to address the separation of powers issue related to Ordinance 2024-800 (the "Ordinance") and only as to the Ordinance. We note further that the Ordinance merely appropriates money and "authorizes" the Mayor to sign a contract. The Ordinance does not require or mandate the Mayor to do anything, and there would be no issue or conflict if she simply did not sign the contract. However, we choose not to hide behind what may be perceived as a technicality, and we address the merits of the underlying issue.

I. Issue:

Does Council's approval of an amendment to Meridian Waste Florida, LLC's ("Meridian") contract (the "Meridian Contract" or the "Contract") contrary to the recommendation of the Rate Review Committee under Section 382.309(b) of the Ordinance Code violate the separation of powers prohibition in the Charter?

II. Short Answer:

Yes, although Council likely complied with the Code in approving the amendment to the Contract, the Code provision providing that power to Council violates the separation of powers explicitly stated in the Charter under these specific facts.

III. Background.

To provide the necessary context for this analysis, we provide the following background. First, we detail the Meridian contract and Council's amendment. Next, we detail the Code provision at issue. Finally, we provide an overview of the applicable Charter provisions.

a. The Contract

On August 23, 2021, the City contracted with Meridian for the collection and disposal of residential curbside solid waste and recyclables collection in certain defined sections of the City from October 1, 2021, through September 30, 2027. *See* Meridian Contract, Sec. 7.1. The Meridian Contract provided for a base rate with an increase in that rate every year based on a defined

consumer price index. *Id.*, Sec. 7.2.4. Every third year, the Contract requires that the parties engage in a more detailed rate review. The Director of Public Works is required to set up a "Rate Review Committee" consisting of, at a minimum, the Division Chief and a staff member from the Council Auditor's office.[1] *Id.*, Sec. 7.2.2.1. To arrive at its recommendation, the Rate Review Committee considers specified data to determine the new rate after the third year. *Id.*, Sec. 7.2.2.2. The Rate Review Committee then reviews its findings with Meridian before recommending the rate increase to Council. *Id.*, Sec. 7.2.2.4. The Rate Review Committee's recommendation "must be approved by City Council." *Id.* In the last three years of the Meridian Contract, the rate increases by 70% of the relevant consumer price index.

We understand that in 2024, as contemplated by the Contract, the Rate Review Committee went through the rate review process and arrived at a recommended monthly per premise rate of $18.29. Council did not approve the recommended rate and instead passed the Ordinance authorizing the Mayor to execute an amendment to the Meridian Contract with a monthly per premise rate of $22.39.[2]

b. Section 382.309 of the Code

Code Section 382.309 provides a similar process to the Contract. Specifically, Section 382.309(b) states that the Concil shall determine the annual rate of compensation for waste haulers every three years. The Code provides the factors for Council to consider in its determination of the rate. *Id.* We note that this Code section was originally codified in or before 1976 and amended several times, most recently in 1998. Clearly, none of the current Council members passed the original bill, and the current Mayor did not approve of the original bill or any of the amendments. We note this history to avoid the appearance of criticism of this Council or this Mayor in creating the Code section at issue.

c. The Charter

The Charter, unlike the United States Constitution but like the Florida Constitution, explicitly provides for a separation of powers among the legislative, executive, and judicial branches. We note that as a general rule, the doctrine of separation of powers does not apply to local governments. *Citizens for Reform v. Citizens for Open Gov't, Inc.*, 931 So. 2d 977, 989 (Fla. 3d DCA 2006) (collecting cases nationwide). However, the Charter's explicit and unequivocal separation of powers clause mandates an exception to this general rule. *See generally* 2012 Opinion, pg. 2.

Charter Section 4.01:

> "The powers of the consolidated government shall be divided among the legislative, executive, and judicial branches of the consolidated government. No power belonging to one branch of the government shall be exercised by either of the other branches, except as expressly provided in this charter."

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[1] We are unsure of who, if anyone else, participated as part of the 2024 Rate Review Committee, and that fact does not impact our analysis in the instant case, regardless of whether the individual was from the executive or legislative branch. We leave for another day the potential impact of the identities of the remaining Rate Review Committee members.

[2] Of course, we take no position on what the appropriate rate increase is.

Charter Section 4.02:

"Where the consolidated government has any power or duty and the responsibility for the exercise of such power or the performance of such duty is not fixed by this charter or by general or special law,[3] the power or duty shall be exercised or performed as follows: **All powers and duties of the consolidated government which are legislative in nature shall be exercised and performed by the council. All powers and duties which are executive in nature shall be exercised or performed by the mayor or such other executive officer of the consolidated government as the mayor may designate, except as otherwise specifically provided herein....** In the event the nature of any power or duty is uncertain, or the law creating such power or duty requires a combination of branches of the consolidated government, the president of the council, the mayor, and the presiding judge of the circuit court shall affix the responsibility for the exercise of such power or the performance of such duty." (emphasis added)

IV. Analysis.

With that background, we proceed with our analysis. Initially, we must determine whether the action of amending the Contract above the recommended rate is considered an executive or legislative function. Next, even assuming that the rate determination is an executive function, we must consider if the Code's granting of that power to the Council rises to the level of a violation of separation of powers under the Charter. Further, if we conclude that there is a separation of powers violation, we need to determine if there is "uncertainty" such that the issue is to be decided by the Mayor, Council President, and Chief Judge. If a part of the Code does violate the Charter and is therefore invalid, we must address whether the violative section of the Code can be severed from the rest of the Chapter 382.[4]

a. Is amending the Contract an executive or legislative function?

The Charter provides little guidance as to the distinction between a legislative or executive function: it simply states that powers and duties that are "executive in nature" are to be performed by the Mayor and all the powers and duties which are "legislative in nature" shall be performed by Council. Rather than repeat what has been artfully stated by former General Counsel, Cindy Laquidara, in her Binding Legal Opinion (12-06), dated November 27, 2012 ("2012 Opinion"), we are attaching her Opinion to this memo and incorporating the thorough analysis of the Charter and the nature of the executive and legislative functions. We do repeat and expand upon several sections of the 2012 Opinion which are of particular relevance.

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[3] We note that the Code is not a general or special law: the state legislature creates general or special law. Further, "[w]hile the Charter, section 5.07, requires the council to determine its own rules and order of business, it does not authorize the council to adopt a rule or ordinance inconsistent with the Charter, except in certain cases expressed in the charter itself." Legal Division, Advisory Opinion Number 271, dated August 11, 1969.

[4] We are not providing an opinion of whether the entire Chapter 382 violates the Charter. Because the analysis is fact specific, we are committed to addressing only the actual issue raised by the Ordinance and the Merdian Contract under these specific facts.

The 2012 Opinion provides an excellent exposition on the difference between executive and legislative acts. In addition, other courts have articulated helpful rules to determine the nature of the act performed. *State v. Charles*, 18 P.2d 149, 150 (Kan. 1933) (*quoting* 43 Corpus Juris 585) ("Acts constituting a declaration of public purposes and making provisions of ways and means of accomplishment may be generally classified as calling for the exercise of legislative power."); *State ex rel. Nelson v. Butler*, 17 N.W.2d 683, 690 (Neb 1945)("The crucial test, for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence."); *Monahan v. Funk*, 3 P.2d 778, 779 (Or. 1931) ("In determining whether the ordinance in question was legislative or administrative, we notice that the authorities in the books are in accord that actions which relate to subjects of a permanent or general character are considered to be legislative, while those which are temporary in operation and effect are not. Acts which are to be deemed as acts of administration and classed among those governmental powers properly assigned to the executive department are those which are necessary to be done to carry out legislative policies and purposes already declared ....").

Relevant here, courts have consistently held that the legislature appropriates the money and the executive spends the money appropriated by the legislature. *See* 2012 Opinion, pg. 8, *citing Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 9 (2002)(collecting cases); *see also McInnish v. Riley,* 925 So. 2d 174, 182 (Ala. 2005) ("the spending of appropriated money [is] an executive function."); *Alexander v. State,* 441 So.2d 1329, 1341 (Miss.1983) ("Once taxes have been levied and appropriation made, the legislative prerogative ends and executive responsibility begins...."); *Fent v. Contingency Review Bd.,* 163 P.3d 512, 521-22 (Okla.2007) ("the administration of appropriated funds is a purely executive task .... The Legislature can exercise no supervision, either directly or indirectly, over the manner in which appropriated funds are to be used"); *Common Cause v. Commonwealth,* 668 A.2d 190, 206 (Pa. Commw. Ct.1995) (legislature cannot "micromanage the executive's power to administer appropriated funds"); *Stockman v. Leddy*, 129 P. 220, 223 (Colo. 1912)(overruled on other grounds)("the General Assembly not only passed an act—that is, made a law—but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members.")

In the 2012 Opinion, this office concluded that contracting for the services of a lobbyist was an executive function. After a thorough review of the history of the separation of powers, the 2012 Opinion concludes: "In so determining that the passing of an ordinance funding a legislative lobbyist is a legislative act, but the contracting for such services is an executive action, this opinion is in conformity with well recognized legal principles." 2012 Opinion, pg. 7.

Based on the case law and the 2012 Opinion, we conclude that the Ordinance accomplishes an executive function. The Ordinance spends money appropriated by Council; the Ordinance impermissibly both makes and executes a law; the Ordinance accomplishes a specific policy set forth in the Code in a temporary manner by authorizing the execution of an amendment to a contract; and the Ordinance has authorized Council to negotiate with a vendor.

b. Does Section 382.309(b) of the Code violate the separation of powers provision in the Charter?

The conclusion that Section 382.309(b) of the Code violates the Charter's separation of powers provisions does not automatically flow from the conclusion that the amendment of the Contract, as implemented by the Ordinance, is an executive function. Several courts have concluded that a flexible approach to the separation of powers analysis is appropriate.[5] *Mistretta v. United States,* 488 U.S. 361, 371–72 (1989) (holding that congressional creation of United States Sentencing Guidelines Commission did not violate separation of powers); *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 406 (1928) ("[i]n determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."); *Brayton v. Pawlenty,* 781 N.W.2d 357, 377 (Minn. 2010) (holding that "cooperative ventures" do not violate the separation of powers); *Hunter v. State*, 865 A.2d 381, 391 (Vt. 2004) (*quoting Trybulski v. Bellows Falls Hydro–Elec. Corp.*, 20 A.2d 117, 119 (Vt. 1941)) ("We recognize that "there must be a certain amount of overlapping or blending of the powers exercised by the different departments"); *but see New Hampshire Health Care Ass'n v. Governor,* 13 A.3d 145, 153 (N.H. 2011) (suggesting that while New Hampshire's constitution has built in flexibility, Florida's (and the Charter's) explicit language provides for less flexibility). We believe that a flexible and practical approach is the most appropriate approach to the separation of powers; however, even under a flexible approach, we conclude that Section 382.309(b) of the Code violates the Charter as detailed below.

One court has adopted a four-part test to determine if the exercise of the power violates separation of power. *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 792 (Kan. 1976). Specifically, the four criteria are: 1) the essential nature of the power being exercised or perhaps a blend of the executive or legislative power; 2) the degree of control exercised by the legislative branch, *i.e.*, is it coercive or cooperative; 3) is the legislature's intent to cooperate with the executive branch by providing expertise or specific knowledge; and 4) the practical (and actual) result of allowing the blending of powers over time. *Id.* The list is not exhaustive, and each factor does not have to be satisfied to find a separation of powers. *Id.* While not universally accepted, numerous courts have used the same or similar tests to determine separation of powers issues. *See State v. Donald,* 10 P.3d 1193, 1205 (Ariz. Ct. App. 2000); *Brandywood Civic Ass'n v. Cohan*, 2020 WL 1866871, *7 (Del. Super. Ct. Apr. 14, 2020) (unpublished opinion)(applying three of the four considerations); *State v. Beard,* 49 P.3d 492, 497 (Kan. 2002); *In re Oklahoma Dept. of Transp. for Approval of Not to Exceed $100 Million Oklahoma Dept. of Transp. Grant Anticipation Notes, Series 2002*, 64 P.3d 546, 550-51 (Okla. 2002). And although it did not provide a detailed analysis of the test, the 2012 Opinion references a similar list of factors. *See* 2012 Opinion, pg. 10. And, most importantly, we think that this four-part test is helpful in analyzing the question posed.

As to the first criteria, the nature of the power at issue is exclusively executive as detailed above.

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[5] Further, if the branches of the Consolidated Government are cooperating, the issue of separation of powers is moot. We do not believe that it is our responsibility to look for potential violations of the separation of powers prohibition if all branches of the Consolidated Government acquiesce, or at least do not object, to a potential usurpation of their power.

Next, we look to whether the exercise of the contested power was coercive or cooperative. Code Section 309(b) provides almost unfettered control of the rate increase to Council, subject only to a veto by the Mayor. *See* Code 382.309(b) ("the Council shall determine the annual rate of compensation"). Even though at least one member of the Rate Review Committee is from the executive branch, Council did not accept the recommended rate. Thus, under this unique fact pattern, the Code allowed Council to proceed with the passage the Ordinance over the objection of the Mayor and without her input. Accordingly, the Code Section 309(b) allows a coercive, and not cooperative, use of the power by Council.

The third factor asks if the Council's exercise of the contested powers was an effort to cooperate with the executive branch by providing specialized knowledge or skill. We cannot easily glean the intent of the Council which originally passed the Code Section, but we can look at the relative specialized knowledge or skill between the Council and the executive branch. Certainly, the Council communicates with its constituents, and we can presume that the communication would involve the constituents' satisfaction with the trash collection. However, between the two branches, the executive branch has greater skill and specialized knowledge about the trash collection. The individuals with specialized skills and knowledge regarding residential waste hauling reside within the executive branch. Specifically, the Chief of the Solid Waste Division has a team of approximately twenty employees, including four who daily supervise solid waste contract compliance, *i.e.*, the Meridian Contract. Finally, the Meridian Contract itself requires Meridian to provide notice to the Division Chief of all complaints received and the resolution of those complaints, and the City, *i.e.*, the executive branch, may resolve complaints without Meridian's assistance but at Meridian's cost. Meridian Contract, 18.3, 18.4. Accordingly, we do not think that the exercise of the power in Section 382.309(b) of the Code was an effort to cooperate by providing specialized knowledge, as the executive branch has significantly more specialized knowledge than the legislative branch.

Next, the practical consequences of allowing the powers to blend, including what has been the actual result of the blending of the power. We have not had the opportunity to review each contract amendment pursuant to Section 382.309(b) of the Code to determine the actual impact of allowing Council, instead of the administration, to set the rate. However, we can discern which branch is better able to negotiate an amendment to a City contract. First, as noted above, the executive branch has a staff of experts in the field, who not only have the industry knowledge but also have the knowledge of administering, and ensuring vendor's compliance with, these very contacts. And these experts are subsequently tasked with administering the contracts. Further, Council is constrained in negotiating a contract (or amendment) while complying with Florida's Sunshine Law and as a collegial body. A nineteen-person body is simply not well equipped to conduct negotiations in the sunshine, regardless of the skills of the individual members.

In addition to the four factors enunciated, we add an additional consideration: the potential consequences of allowing this provision to stand. If Council's exercise of this power does not violate the Charter's clear separation of powers provision, then the Charter's explicit separation of powers prohibition is almost meaningless. As shown above, Section 382.309(b) of the Code

essentially removes the executive branch[6] from a core function of local government: residential waste hauling and disposal. If the executive branch has no role in a core function, then the Mayoral office is but a figurehead who performs only ministerial acts at the Council's direction. *See Jones v. Chiles*, 638 So.2d 48, 51 (Fla. 1994) (finding a violation of separation of powers when legislation eliminated the executive's power thereby making his actions purely ministerial). And this conclusion is contrary to the strong-mayor model found in the Charter and the explicit separation of powers prohibition. *D.R. Horton, Inc.--Jacksonville v. Peyton,* 959 So.2d 390, 397 (Fla 1st DCA 2007); 2012 Opinion.

As all of the considered factors militate in favor of a violation of the separation of powers provision in the Charter, we conclude that the Ordinance is an invalid exercise of executive power by the legislative branch.[7]

c. Is the violation "uncertain"?

The Charter contains an atypical provision: if the nature of the power is "uncertain," then the decision on the proper allocation of that power falls to the mayor, the council president, and the presiding judge of the circuit court, *i.e.*, the chief judge for the Fourth Circuit. The Charter provides no guidance on the term "uncertain," so we look to the everyday usage of the term. The American Heritage Dictionary defines uncertain in this context as 1) not known or established; doubtful, 2) not determined, undecided, 3) not having sure knowledge. American Heritage Dictionary, pg. 1315 (1985). As discussed above, the relevant considerations all point to a violation, and research revealed no support for the proposition that a legislature can appropriate money and then spend that money,[8] we conclude that the nature of the power found in Section 382.309(b) of the Code is not uncertain.

d. Can the violative section be severed?

A statute (or code) may be unconstitutional in part and constitutional in part. *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 9 (2002); *Fent v. Contingency Review Bd.*, 163 P.3d 512, 524 (Okla.2007). And a court must determine if the unconstitutional part can be severed from the constitutional parts, with a presumption that the infirm portion is severable. *See Fent*, 163 P.3d at 524. If the purpose of the statute can be carried out without the invalid portions, then the remedy is to sever those portions. *Knotts*, 348 S.C. at 9. Conversely, if the unconstitutional part is critical to the purpose, then the whole statute must be held unconstitutional. *Id*. Stated another way, if the

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[6] Of course, the Mayor retains the power of the veto. However, a veto is a check on legislative power, which is considered to be separate from the separation of powers analysis. *See generally John Delvin, Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp. L. Rev. 1205, 1212 n. 24 (1993).

[7] We recognize that the violative code was adopted in or prior to 1976, either with the then-mayor's signature or over his veto, and since that time, the code has gone unchallenged. The mere passage of time without a challenge does not preclude a finding of a violation of separation of powers. *See Jones v. Chiles*, 638 So.2d 48, 48, 51 (Fla. 1994) (finding a separation of powers violation nineteen years after enactment of legislation).

[8] Other Florida local governments do not have a strong-mayor form of government and no explicit separation of powers prohibition. Thus, other local legislative bodies have the power to spend and contract. *See Ramsey v. City of Kissimmee*, 190 So. 474, 476 (Fla. 1939). In light of the Charter, the vesting of powers in other counties is not determinative.

valid portions are not so "inseparably connected with and so dependent upon" the invalid portions, then the proper action is to sever only the invalid portions. *Fent*, 163 P.3d. at 524. In *Fent*, the court severed the infirm portions finding that the legislative intent was to allow the executive to budget and expend appropriations, and that goal was achievable without the unconstitutional approval process through the legislative branch. *Id.*

As detailed above, we are only finding a violation of the Code's provision which provided to Council the power to approve a rate increase, separate from the Rate Review Committee and without any role for the executive branch. If the Ordinance and the specific code provision allowing Council to approve an increase separately from the Rate Review Committee is severed, the intent of the bill is still achievable. Council can pass a separate ordinance approving the recommended rate increase consistent with this memo.[9]

V. Conclusion

"The purpose of the doctrine of separation of powers, in line with a principle of unified consolidated government is to properly allocate authority and power, to appropriately set forth the lines of protection from undue encroachment and usurpation, and to allow for the uninhibited exercise by each branch of government's necessary functions." 2012 Opinion, pg. 11. For all of the reasons noted above, we conclude that this Ordinance allowing Council to appropriate and spend money in the same step, over the Mayor's objection, violates the Charter's separation of powers prohibition, under these specific facts.

Finally, we note that even if there are Code provisions or long-standing City practices that are potentially violative of the separation of powers prohibition, the contracts or ordinances that resulted from those provisions or practices are valid. And future contracts under potentially violative Code provisions and practices will likewise be valid, as long as the branches are cooperating. The issue of separation of powers will only come into play when one branch believes that its power has been infringed upon. *See Jones v. Chiles*, 638 So.2d 48, 48, 51 (Fla. 1994) (noting that the executive branch did not object to the infringement of its power for nineteen years during which the legislative branch exercised an executive function); *see also* 2012 Opinion. When, and if, a branch of Consolidated Government asserts a violation of the Charter, our office stands ready to address the issue on a case-by-case basis consistent with the law and those facts.

[9] As noted above, we are deciding only the limited facts before us, and if a new ordinance is passed and a separate question on its validity were raised, we would decide that issue on those unique facts.