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**RE: Proposed Ordinances 2010-15 and 17, Seeking to Delete Article I, § 1.05(a)(1) of the Retirement Plans of the Police Officers & Firefighters of the City of North Miami Beach and the General Employees of the City of North Miami Beach**

I have examined proposed Ordinances 2010-15 and 2010-17, the pertinent sections of the Retirement Plan for General Employees and the Retirement Plan for Police Officers and Firefighters, the June 28, 2010 Opinion Letter relating to "Plan Amendment Issue" and the relevant constitutional, statutory and case law. My opinion is that the provisions of the Plans requiring amendments to be approved by a certain percentage of the active participants is not unconstitutional, is not in derogation of any law, and that to the contrary, any effort "to eliminate" the approval provision would be in derogation of the Florida Constitution.

**A. <u>The June 28 Opinion Letter</u>**

The Opinion Letter suggests that the provision in Section 1.05 of each of the Retirement Plans requiring approval of amendments "is an improper delegation of the City Council's legislative authority; and second, it conflicts with the constitutionally mandated collective bargaining process for any changes that are subject to that process." Letter, p. 5.

As to "improper delegation," the Letter asserts that "the Florida Constitution's separation of powers clause prohibits the unlawful delegation of constitutional powers," and that a legislative body cannot "delegate its authority to legislate to . . . private persons or entity [sic]." *Id.* As to "constitutionally mandated collective bargaining" changes, the Letter opines that the approval process somehow is akin to a "referendum procedure, [which] when applied to collectively bargained pension

agreements, unconstitutionally abridges the employees' fundamental right of collective bargaining." *Id.* at 7.

Neither suggestion of conflict with State law has merit.

**B. <u>The Plan Provisions</u>**

The Retirement Plan for Police Officers & Firefighters of the City of North Miami Beach provides, in relevant part:

> S. 1.05 **AMENDMENT OF PLAN**
>
> (a) **<u>Resolution of City</u>** – The Plan may be amended by the City from time to time in any respect whatever, by resolution of City Council of North Miami Beach, specifying such amendment, subject only to the following limitations:
>
> (1) **<u>Approval of Participants</u>** – Approval of 60% of the active members shall be required before the Plan may be amended by the City Council. Changes to benefits or contributions will be negotiated as required by Chapter 447, Florida Statutes.
>
> (A) Such consent shall not be required if such amendment pertains to the actuarial soundness of the Plan, as determined by the actuary employed by the City Council in accordance with Section 5.06, or if such amendment shall be necessary to comply with any laws or regulations of the United States or of any state to qualify this as a tax-exempt plan and trust.

The Retirement Plan for General Employees of the City of North Miami Beach contains the same provision, except that the approval is "66 and 2/3 percent of the active participants of the Plan." See Section 1.05, Retirement Plan for General Employees of the City of North Miami Beach.

The Plans are longstanding. The Police Officer and Firefighters "Plan, effective October 1, 1965, becomes effective as revised and restated January 1, 1990, and is an amendment, restatement and continuation of the superseded plan, adopted effective as of July 1, 1957." § 1.04. The General Employees Plan is similarly longstanding. *See* § 1.04 of that Plan.

### C. <u>There is No Unconstitutional Delegation of Authority</u>

A flaw in the Opinion Letter is that the improper delegation of authority principle in the Florida Constitution is a separation of powers/separate branches of government principle. The Letter cites *Chiles v. Children A. B. C. D. E and F*, 589 So. 2d 260 (Fla. 1991), but *Chiles* makes clear that the Florida Constitutional provisions are as we say:

> This Court has repeatedly held that under the doctrine of separation of powers, the legislature may not delegate the power to enact laws or to declare what the law shall be, *to any other branch* [of government]. Any attempt by the legislature to abdicate its particular constitutional duty is void.

*Id.* at 264 (emphasis supplied). That improper delegation line of cases has no currency here.

*Watson v. City of St. Petersburg*, 489 So. 2d 138 (Fla. 2d DCA 1986), another case offered by the Letter, addressed a situation where the city passed an ordinance and the ordinance provided that the city manager could "waive the terms of the ordinance." *Id.* at 139. Thus, the ordinance was illusory; the city had invested unbridled discretion in the manager to invalidate the relevant portion of the ordinance. That too is not the case here.

Here, the approval process falls within the principle that "it is equally well settled that when a law is made, its execution may be made to depend upon a condition precedent, that is to say, on a vote of a certain portion of the people, or on approval of the lot owners in a given area." *Taylor v. City of Tallahassee*, 177 So. 719, 721 (Fla. 1937). In *Taylor*, the approval process called for 60% approval of the property owners in a block where a pool hall was located, "and also on the blocks adjoining thereto on the North and South and/or on the East and West of said block." *Id.* at 423. The Court invalidated that portion of the ordinance because "as to the blocks north, south, east and west," it was impossible to tell what portion of their property owners were being described as necessary for approval, and, in addition, the ordinance was arbitrary because the other pool room on Monroe Street was excluded from the approval process. The lesson of *Taylor* is that if 60% of the Monroe Street property owners had been the only required approvers of any pool hall, the ordinance would have passed muster. Applying that lesson here, it is clear that the approval process is a valid condition precedent exercised by a certain portion of the affected people.

Thus, *Taylor* is supportive of the proposition that the North Miami Beach plan approval requirements, which are not arbitrary, and are addressed to the discrete group affected, are proper. The Opinion Letter's reliance on *Amara v. Daytona Beach Shores*, 181 So. 2d 722 (Fla. 1st DCA 1966) tellingly omits *Amara's* adoption of the *Taylor* principle that a legislative body "may make a law and incorporate therein a condition precedent upon which execution may depend but it cannot be

made to depend on the unbridled discretion of a single individual." *Id.* at 725 (citing *Taylor v. City of Tallahassee*).

In *Amara*, the court invalidated a Daytona Beach ordinance which required beach concessionaires to obtain "the written consent of the ocean front property owners possessing property rights, including but not limited, to riparian or littoral rights to the Atlantic Ocean Beach . . . ." *Id.* at 723-724. The court held that the city could not let an individual property owner veto a legitimate business and that "[t]he burden of determining who is an oceanfront property owner having riparian rights involve legal questions too intricate to impose as a condition precedent to the issuance of a license to conduct a legitimate business." *Id.* at 724-725. *Amara does not* stand for the proposition that properly defined and described persons are improper "condition precedent" actors. Indeed, it supports the proposition that such approval, properly focused, is permissible.

None of the cases offered in the Opinion Letter support the suggestion that requiring approval of certain percentages of Plan participants is an unconstitutional delegation of legislative authority. The Plan members are not exercising "unbridled discretion" in the approval process. Opinion Letter, p. 6. They are uniquely and directly affected, and are vitally interested participants in Plans the City has authorized by law and has, by law, made approvals the condition precedent for any changes in the Plans. The suggestion that the approval process violates any improper delegation principle embodied in Florida law is without merit.

### D. <u>There Is No Conflict with Collective Bargaining Principles</u>

The Opinion Letter concedes that the PERC referendum decisions it cites are inapposite: "The foregoing court and PERC decisions make clear that a [voter] referendum is not required to approve pension changes that are collectively bargained between a city and a union representing its employees. Although a referendum requirement is not at issue here . . . [the approval process] is analogous." Opinion Letter, p. 8. Analogous mean "corresponding in some particular." *Webster's Encyclopedic Unabridged Dictionary of the English Language* (1996). Voter referenda and Plan participant approval are not analogous.

The difference between seeking voter approval for a collective bargaining agreement, and a pension plan agreement which by its terms requires changes to be approved by members of the pension plan, is too great a difference to be cast as "analogous."[1] The Opinion Letter's cite to, and extensive quotation from, *In Re the Petition for Declaratory Statement of the City of Miami Beach*, 23 FPER ¶ 28230 at 361 contains this quoted sentence: "'The State Legislature, when it enacted Chapter 447, Part II, Florida Statutes did not provide for a veto of collective bargaining by the electorate of a municipality. A referendum to effectuate the negotiated changes in pension benefits is not required. *See City of West Palm Beach*, 448 So. 2d at 1215 (a proposed ordinance which changed the method of the approval of terms of a

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[1] It should be noted that the pension plan members who have an approval voice are not co-extensive with members of a collective bargaining unit. There are members of both plans who are not in a collective bargaining unit and are not covered by a collective bargaining agreement.

collective bargaining agreement was prohibited under the preemption provisions of Article VIII, § 2(b), Fla. Const. and Chapter 166, Florida Statutes).'" Opinion Letter, p. 7. Nothing in any of the PERC decisions offered by the Opinion Letter supports the notion that Plan members cannot be part of the approval process within the collective bargaining process. Indeed, the City's proposed effort to change that process is the only thing that is invalid, and the quotation offered by the Opinion Letter confirms that changing the Plan by changing the ordinances is constitutionally problematic.

Moreover, the Plans are a contractual agreement between the City and the Plan members, and having accepted the benefits of those agreements, and having incorporated approval into the Plans, the City is estopped from denying the validity of its agreements. *See City of Miami v. Bus Benches, Co.*, 174 So. 2d 49, 52 (Fla. 3d DCA 1965) ("a municipality is bound to recognize its contracts, the same as an individual and one party to a contract with a municipality is entitled to the constitutional protection against impairment of it if the municipality attempts to unilaterally change its obligations under a valid agreement.") (internal citations omitted).

### E. The Proposed Ordinances Would be An Unconstitutional Impairment of Contract

The respective Plans require that "approval of 60 [or 66 2/3] % of the active members shall be required before the Plan may be Amended by the City Council [except for "actuarial soundness]." *See* Sections 1.05(a)(1) of the respective Plans. The approval requirement is an inherent and vitally important aspect of the pension

plan agreements. The proposed ordinances seek to "eliminate" those provisions in the Plans. If the "elimination" ordinances are enacted, the ordinances would violate Article I, section 10 of the Florida Constitution: "Prohibited laws. – No . . . law impairing the obligation of contracts shall be passed."

"The obligation of contract is impaired in the constitutional sense when the substantive rights of the parties thereunder are changed . . . or where new and different liabilities are imposed." *Commodore Plaza at Century 21 Condominium Assoc., Inc. v. Cohen*, 378 So. 2d 307, 309 (Fla. 3d DCA 1980) (internal citation omitted). The proposed ordinances would do just that.

Former Chief Justice England addressed the contract clause strict scrutiny required by the Florida Constitution:

> In our view, any realistic analysis of the impairment issue in Florida must logically begin . . . with *Yamaha Parts Distributors, Inc. v. Ehrman* which applied the well-accepted principle that virtually no degree of contract impairment is tolerable in this state . . . .
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> * * *
>
> Our conclusion in *Yamaha* that "virtually" no impairment is tolerable necessarily implies that some impairment is tolerable although not so much as would be acceptable under traditional federal contact clause analysis.

*Pomponio v. Claridge of Pomponio Condominium, Ins.*, 378 So. 2d 774, 780 (Fla. 1980).

Against that backdrop, the Second District Court of Appeal held that the "*Pomponio* balancing test which 'weighs the degree of impairment against the source of authority under which the law is enacted and the 'evil' the law is intended to

remedy . . . *is not required* . . . where the statutory enactment 'results in an *immediate diminishment* in the value of the contract.'" *Coral Lakes Community Assoc., Inc. v. Busy Bank, N.A.*, 30 So. 3d 579, 585 (Fla. 2d DCA 2010), quoting *Sarasota County v. Andrews*, 573 So. 2d 113, 115 (Fla. 2d DCA 1991) (emphasis supplied). The proposed North Miami Beach ordinances will, if enacted, constitute an "immediate" diminishment and no "balancing" is appropriate; the ordinances would violate the Constitution. *See also Cohn v. Grand Condominium*, 26 So. 3d 8 (Fla. 3d DCA 2009), declaring a statute unconstitutional under the impairment of contract clause of the Florida Constitution where the legislature sought to retroactively change voting procedures in the condominium context: "It is our view that the voting arrangements in a condominium are of great importance, and the change imposed by subsection 718.404(2) operates as a substantial impairment of the existing contractual relationship." *Id.* at 10. Here, the voting arrangements guaranteed in the Plans are of great importance, and the attempt to eliminate them would, like *Cohn* work a severe and immediate change in the Plan agreements.

In *Sarasota County*, the court condemned an ordinance establishing the County's lien superiority over other liens in a certain situation, and the County argued that "if the land is of sufficient value, both liens can be satisfied." 573 So. 2d at 115. That suggestion of there possibly being no future harm was rejected by the court:

> We need not consider the value of the underlying property because the priority provision has worked an immediate impairment on Coast Federal's preexisting mortgage lien. The nature of priority is such that Coast Federal is automatically at a substantially greater risk of losing its investment if it has only a second, as opposed to a first,

> priority lien . . . . This immediate diminishment in the value of Coast Federal's contract is repugnant to our constitutions. *See In re Advisory Opinion to the Governor, Request of May 12, 1987*, 509 So. 2d 292, 314 (Fla. 1987), *citing Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978).

*Id.* Here, the proposed ordinances would work an immediate impairment on the respective Plans participants' preexisting contractual agreements. Losing their voice in the Plan amendment process places them automatically at a greater risk of losing Plan benefits if they have no voice, as opposed to the approval voice guaranteed under the Plans.

The amendment approval portions of the Plans are an integral part of the Agreements. If the City, by ordinance, deletes them, those "elimination" ordinances would violate Article I, Section 10 of the Florida Constitution.

Respectfully,

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cc: Bonni Jensen (via email)
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