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October 8, 2013

Board of Trustees  
North Miami Beach General Employees' Retirement Plan  
c/o Marty Lebowitz, Pension Coordinator  
17011 N.E. 19<sup>th</sup> Avenue  
N. Miami Beach, Florida 33162-3194

*Re: City Council's changes to the Pension Code*

Dear Trustees:

This letter provides our legal opinion as to the appropriate course of action for the Committee in light of the City Council's recent amendment of the North Miami Beach General Employees' Retirement Plan and your participants' referendum vote disapproving those amendments.

This Committee, as trustees of the plan, has the duty to administer the terms of the pension ordinance and plan. The Plan empowers the Committee to take action to fulfill its duty to "carry out the provisions of the Plan" and "effectuate [its] purposes."<sup>1</sup> The pension plan can be amended by the City Council, under Section 1.05(a), but only after the proposed amendments have been approved by 66-2/3% of the Plan's participants.<sup>2</sup> Because the Committee must implement and enforce the terms of the plan as it is written, it may only implement those amendments which have been both approved by the participants and passed by City Council.

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<sup>1</sup> See Retirement Plan for General Employees of the City of North Miami Beach, §5.04 ("The Retirement Committee shall have the authority to make such rules and regulations and to take such action as may be necessary to carry out the provisions of the Plan."); §5.05 ("In order to effectuate the purposes of the Plan, the Retirement Committee shall have the power to construe the Plan, to supply any omissions therein, to reconcile and correct any errors or inconsistencies and to make equitable adjustments for any mistakes or errors made in the administration of the Plan.").

<sup>2</sup> See §1.05(a) ("Resolution of City – 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) Approval of Participants – Approval of 66-2/3% of the active participants shall be required before the Plan may be amended by the City Council.").

Recently the City Council adopted an ordinance amending the plan. As you were required to do by §§1.05 and 5.04 of the plan, you submitted those plan changes to a vote of your active plan participants. We have been advised that the plan members overwhelmingly voted against so amending the plan. No objections to the conduct of the referendum were filed. If the Committee implements the changes set out in the City's ordinance it will be violating the terms of the plan because those changes did not receive the 66-2/3% participant approval required to change the plan.

In the past, the City's pension attorney contended that the 66-2/3% approval provision is unconstitutional and should be disregarded.<sup>3</sup> To evaluate this claim, in 2010 you retained professor of law Bruce S. Rogow, a noted constitutional law expert and practitioner. Professor Rogow opined that the approval provision was not unconstitutional. He also opined that repealing the member approval requirement "would violate Article I, Section 10 of the Florida Constitution."<sup>4</sup>

Thus, there is a clear disagreement between the City's lawyer and your lawyer on whether the 66-2/3% approval requirement is constitutional and whether it can be validly repealed. The Committee need not and cannot take sides in this debate. The question of the constitutionality of the 66-2/3% approval provision is not relevant in determining what the Committee should do because you do not have the authority to decide whether the 66-2/3% approval requirement is constitutional or unconstitutional.

It is a well-settled principle of Florida administrative law that an "administrative agency," such as the Committee, "has no power to declare a statute void or otherwise unenforceable." *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So.2d 249, 249 (Fla. 1987); *Lennar Homes, Inc. v. Department of Business and Professional Regulation*, 888 So.2d 50, 53 (1<sup>st</sup> DCA 2004). This principle holds true even when following a statute or ordinance would lead to an unfair result that raises due process concerns. *Holmes v. City of West Palm Beach*, 627 So.2d 52, 53 (4<sup>th</sup> DCA 1993). Only the courts have the power to declare a law to be unconstitutional and agencies must assume that a law is constitutional until a court declares otherwise. *State ex rel. Atlantic Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922);

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<sup>3</sup> See June 28, 2010 opinion letter of James W. Linn re "City Pension Matters," page ("In our judgment, the requirement that a pension plan be approved by sixty-six and two-thirds of the active plan participants is contrary to state law for two fundamental reasons: first the approval requirement [sic] it 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.").

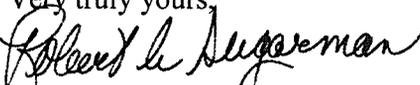
<sup>4</sup> See August 5, 2010 opinion of Bruce Rogow re Proposed Ordinances 2010-15 and 17, page 2 ("My opinion is that the provisions of the Plan requiring amendments to be approved by a certain percentage of the active participants is not unconstitutional, is not in derogation of any law, and that to the contrary, any effort to 'eliminate' the approval provision would be in derogation of the Florida Constitution.")

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In light of the foregoing, the Committee should continue to administer the terms of the current plan (disregarding the amending ordinance because it was not approved by 2/3 of the participants) as you did before the City passed the ordinance until (1) the City Council's amendments are approved by 66-2/3% of the system's active members in a subsequent referendum or (2) a court rules that the City Council's amendments are valid and enforceable.

It is possible that the City will commence litigation that seeks to vindicate its actions. The constitutionality of the 66-2/3% approval provision can then be determined by a court, the only forum that can decide such questions. Hopefully the City and the participants or their representatives can resolve their disagreements. In the meantime, you must administer and implement the plan as it was written.

The absence of 66-2/3% member approval prevents you from administering and implementing the City Council's changes. The specter of litigation cannot excuse the Committee's responsibility to properly administer the plan.

Very truly yours,  
  
ROBERT A. SUGARMAN