December 21, 2014

To: Walt Bussells, Chairman

From: Bob Klausner

Re: Review of Council Proposed Resolution

I have reviewed Council approved Retirement Reform Agreement dated December 9, 2014. I have compared it with the Agreement which was the product of public meetings between the Mayor and John Keane from earlier this year with the assistance of a facilitator, and approved in principle by the Board.[1] For the purposes of this memo, that will be referred to as the Mediated Agreement (MA). The Council proposal will be referred to as the CP.

At the outset, the MA was described and agreed to as the 4th Amendment to the 30 year Agreement. The CP is intended to repeal the 30 year agreement and constitute an entirely new agreement.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***The CP does not repeal the 30 year agreement (30YA). Parties may agree, however, to supersede and replace an agreement or a series of agreements. The CP, if agreed to by the Board, would do just that. It would supersede and replace the 30YA with the new agreement, i.e., the CP, which would stand alone rather than become another amendment to the 30YA. Pursuant to the MA, all of the provisions of the 30YA which were not changed as a result of the 2014 negotiations remain in effect. Those provisions were moved into the new agreement. Therefore, the CP contains three sets of provisions: (1) the unchanged provisions from the 30YA; (2) the MA provisions that Council did not change; and (3) the new CP changes (which amended MA provisions).***

The MA had a split term. Benefit matters and funding were tied together for a term of 10 years (2014-2024) and all other provisions of the original agreement (particularly governance) continued until 2030. The CP allows benefit changes within 3 years on a unilateral basis. In particular, the CP makes reference to and is dependent upon collective bargaining between the FOP and JAFF and the City. The MA was intended to remove the Board from any participation in benefit design issues after the term of the MA on the issue of benefits expired in 2024.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***The MA specifically states that "following the implementation of these benefit modifications, the JPFPF shall not engage in the determination of pension***

[1] We have also reviewed the implementing ordinance. As the ordinance will need revision should any part of the December 9 proposal be amended, the focus of our study has been on the Agreement itself.

benefits…" and, allows the City and the Unions to engage in collective bargaining upon ratification of the MA. The MA, then, immediately prohibits the Board from negotiating pension benefits. This was extensively discussed in final public meetings between the COJ and the PFPF and in the City Council's extensive review of this agreement, without any disagreement from the PFPF. The record is clear that the PFPF will no longer be part of pension design discussions once this agreement becomes effective.

Under the MA, the City and unions could negotiate changes in pension benefits by mutual agreement, but the City could not impose changes in pension benefits pursuant to the collective bargaining impasse process within 10 years following the effective date of the MA. The CP removes the restriction on the City's ability to impose changes in pension benefits within 10 years following the effective date. Thus, under the CP, changes in pension benefits, like all terms and conditions of employment, would be subject to the collective bargaining process, including the impasse resolution process, provided in Chapter 447, Florida Statutes. Each version has the Plan governance provisions continuing through 2030.

The Board and the City have never engaged in collective bargaining. Collective bargaining agreements have a 3 year term under Sec. 447.309(5) Fla. Stat., to allow employees the opportunity to alter the representative association in accordance with 447.307, Fla. Stat. Nothing would prohibit the City and the unions to agree to waive bargaining.

The definition of "participant" fails to include disabled children who are entitled to lifetime benefits which would otherwise end at majority (or the end of full time student status) for unimpaired children. We believe that to be an unintentional drafting oversight, as it is later mentioned in the benefit design section.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

The 30YA provides the language of this definition. (See page 6, paragraph r. of the 30YA.). As noted, the MA incorporates unamended provisions of the 30YA by reference, whereas the CP places those provisions directly within the CP.

The benefit design section for persons first hired after the effective date is identical between the MA and CP.

The DROP interest crediting rate for current members entering DROP after the effective date in the CP is 0%-10%, whereas the MA has an interest crediting rate of 5%-10%. The CP still requires a contribution during DROP whereas the MA did not.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

The MA incorporates the only negotiated change in the terms of the DROP program, i.e., changing the guaranteed rate of return from 8.4% to the Plant's net rate of return, with a minimum of 5% and a maximum of 10%. The CP

retains the net rate of return and 10% maximum, but modifies the minimum rate to 0%. The MA does not change any of the other provisions of DROP, and, therefore, the MA incorporates by reference from the 30YA all of the other DROP provisions. (See page 9, paragraph C. of the 30YA). In other words, the MA retains the 2% member contribution during DROP. Because unchanged provisions from the 30YA were moved into the CP, the CP now expressly states the contribution required rather than incorporating by reference the contribution requirement as the MA did.

The COLA for current employees in the MA remained 3%. In the CP, COLA on credited service prior to the effective date is 3% and all subsequent credited service earns COLA at the Social Security rate but not greater than 4%. The COLA provision has no impact on members eligible to retire on or before the effective date.

The CP has a new section entitled "City Contribution Rate." It requires a minimum City contribution of 7% until all current unfunded actuarial liabilities are satisfied. The current plan requires payment of the actuarially certified annual required contribution (ARC). This section is unclear in that it could be read to require only a 7% employer contribution while the participants are paying 10%. If it is meant to say that the City will have a floor of 7%, even if the ARC is less than 7%, it should be clarified.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

Section III(A)(3) of the CP clearly states that the City's contribution will meet the actuarial funding requirement of the Plan, and in no event will the City's contribution be less than 7% of payroll. This section carries forward language regarding the minimum city contribution rate from section III(A) of the 30YA, stating that the City contribution shall be "at least 7% of payroll until the ... actuarial liabilities of the Plan are fully funded." The parties did not agree to change this language; consequently, the MA retains it. As a practical matter, the City's contribution will be much more than 7% of payroll for many years. The most recent projections prepared by the City Actuary shows that the normal cost of the Plan (which Florida Statutes require the City to fund in any event) will be more than 16% of payroll for at least the next 30 years.

The CP calls for transfer of the balances from the Enhanced Benefit Account and the City Stabilization Account to be used as a City contribution. The MA had no limitation on the immediacy of the use. The CP limits the use of this amount to 3.25% of the valuation payroll in any year which currently is approximately $4 million.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

The CP does not provide for a transfer of the balances from the Enhanced Benefits Account (EBA) and City Budget Stabilization Account (CBSA) "to be used as a City contribution." Section III(D)(1) of the CP states that within 30 days following the effective date, the JPFPF will "apply the balances in the Enhanced Benefits Account and City Budget Stabilization Account to reduce

the unfunded actuarial liability of the Plan."

Section III(D)(3) of the CP states that future Chapter 175/185 funds received annually, less the amount for the discretionary bonus payment, shall be applied at the City's discretion "for the benefit of the Plan, including without limitation, to fund base benefits, to reduce the actuarial unfunded accrued liability, or to mitigate the city's annual required contribution to the Plan."

Section II(A)(4) of the CP carries forward language from the 30YA stating that the City may use monies in the City Budget Stabilization Account to help meet City funding requirements, up to 3.25% of payroll until the unfunded liability is fully amortized. There was no agreement to change this language. Reading this language together with section III(D(1), it is clear that the entire balance of the CBSA will be applied to reduce the unfunded liability within 30 days following the effective date of the agreement. To the extent that there is any future balance in the CBSA, the City may use those monies annually, up to 3.25% of payroll, to reduce the City's annual required contribution to the Plan.

The MA contemplated a transfer of $61 million, but the balance in the accounts now exceeds $80 million, due to superior investment performance. This section does not contemplate a present value equivalent (PVE) transfer but the City enhanced contribution of $40 million annually for a ten year period does allow an immediate PVE which would be approximately $240 million.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

Section III(D)(1) of the MA (and the same section of the CP) state that the balances in the Enhanced Benefits Account and City Budget Stabilization Account on the effective date shall be applied to reduce the unfunded liability of the Plan. The $61 million figure was used to show the balance on 10/1/13, but the parties agreed to apply the balances in those accounts on the effective date. The MA and CP also provide for an additional payment by the City of $40 million per year for 10 years (less the balances of the EBA and CBSA) to reduce the unfunded liability of the Plan. Section III(D)(2) of the CP allows the City to prefund all or a portion of the 10 year additional payment by paying the equivalent net present value amount. Because the EBA and CBSA monies are a one-time payment, the equivalent net present value amount is not applicable.

The CP requires a reduction from the Enhanced Benefit Account for any increase in normal cost or actuarial losses attributable to enhanced benefits. The MA does not have such a provision as the MA contemplated a defined contribution component in the form of a pro rata distribution of insurance premium tax money. It is unclear what this section would accomplish. A DC component which is entirely dependent on the Chapter 175/185 money could never rise or fall in cost. Clarification of this section is required. If it is meant to apply to any new defined benefit adopted after the effective date, it should more clearly specify this point.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***As noted above, the MA reflected only those provisions of the 30YA that were being modified. Section II(A)(4) of the CP carries forward language from the 30YA stating that the City may use monies in the City Budget Stabilization Account to help meet City funding requirements, up to 3.25% of payroll until the unfunded liability is fully amortized. There was no agreement to change this language. Reading this language together with section III(D(1), it is clear that the entire balance of the CBSA will be applied to reduce the unfunded liability within 30 days following the effective date. To the extent that there is any future balance in the CBSA, the City may use those monies annually, up to 3.25% of payroll, to reduce the City's annual required contribution to the Plan.***

The CP requires Council approval for the budget. The current Agreement does not and the MA was silent on the issue. The CP requires use of the City purchasing department. The MA is silent and the current ordinance code provides an exemption.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***Paragraph 25 on page 21 of the 30YA provides for Council approval of the Board budget, as well as, a requirement that the Board comply with the Purchasing Code. The MA does not amend these requirements and therefore incorporates them by reference. The CP contains this language from the 30YA rather than incorporating it by reference.***

On the ethics and disclosure provisions, it should be noted that they apply only to financial advisors with discretionary authority for investment. It should be expanded to cover all financial advisors, primarily any investment consultant and custodian.

Governance provision of the CP differs from the MA on term limits for the two City appointees, limiting them to a maximum of two terms of 4 years each. It also prohibits any person enrolled in a City sponsored retirement program from serving as a City appointee. The current state law and the Charter allow the Council to replace their two appointees at will. One of the two current City appointees is receiving a benefit from the City Retirement System, but the cost is derived from an independent agency. It is unclear if this provision would require the City to replace this appointee. The Attorney General has opined that no qualifications can be set for the 5th member. That person has, however, always been someone who met the management, financial, and educational goals outlined in the CP.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***The MA outlined the goals regarding the 5th member's qualifications. The only changes from the MA to the CP regarding Board members are with regard to the City appointed members and in no way affect the 5th member.***

The CP is silent concerning the issue of the now closed Senior Staff Pension Plan. The MA required the plan to be closed and frozen. It is unclear if this issue is deemed resolved by the

Board's action closing that plan or remains a point of controversy.

The additional unfunded liability payments require a minimum transfer from the Enhanced Benefit Account and the City Stabilization Account in an amount of approximately $61 million. As noted above, those account balances have increased to approximately $80 million. The MA contemplated a $61 million payment.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***As noted above, section III(D)(1) of the MA (and the same section of the CP) state that the balances in the Enhanced Benefits Account and City Budget Stabilization Account on the effective date shall be applied to reduce the unfunded liability of the Plan. The $61 million figure was used to show the balance on 10/1/13, but the agreement was to apply the balances in those accounts on the effective date.***

The MA called for a 10-year additional contribution (above the ARC) of $40 million per year. The CP permits an immediate payment of the PVE which would be approximately $240 million. As noted above, the PVE is not applied to the Fund transfer.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***As noted above, Section III(D)(2) of the CP allows the City to prefund all or a portion of the 10-year additional payment toward the unfunded liability by paying the equivalent net present value amount. Because the EBA and CBSA monies are a one-time payment, the equivalent net present value amount is not applicable.***

The MA calls for ½ of the Chapter 175/185 premium taxes to be used for unfunded liability reduction until approximately $46 million had been contributed, for a total commitment from the Fund of $107 million. The CP requires all of the insurance premium tax money for period of 7 years (less the discretionary holiday bonus) which would be approximately and additional $49 million, plus the $80 million in the Enhanced Benefit and City Stabilization Accounts for a total Fund contribution of $129 million. This represents an additional contribution by the Fund of approximately $22 million.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***Section III(D)(2) of the MA states that Chapter 175/185 funds received annually from 10/1/15 through 9/30/21, less the amount to fund the annual discretionary bonus payment, "shall be applied to the base benefits of the Plan or as additional unfunded liability payments." This provision is carried forward with substantially similar language in section III(D)(3) of the CP.***
>
> ***As noted above, section III(D)(1) of the MA (and the same section of the CP) state that the balances in the Enhanced Benefits Account and City Budget Stabilization Account on the effective date shall be applied to reduce the***

unfunded liability of the Plan. The $61 million figure was used to show the balance on 10/1/13, but the agreement was to apply the <u>balances</u> in those accounts on the effective date.

This is also a material difference in the use of the Chapter money. Under the MA it was used entirely to reduce the unfunded liability. Under the CP it can be used in lieu of a portion of the City's annual required contribution. This may conflict with Chapter 175 and 185, as well as the Charter. It is also potentially in conflict with 3.25% of payroll limitation on the use of transferred reserves (whether $61 million or some larger amount).

<u>CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14</u>:

As noted above, section III(D)(2) of the MA states that Chapter 175/185 funds received annually from 10/1/15 through 9/30/21, less the amount to fund the annual discretionary bonus payment, "shall be applied to the base benefits of the Plan or as additional unfunded liability payments." This provision is carried forward with substantially similar language in section III(D)(3) of the CP. The CP includes additional language on how the Ch. 175/185 funds may be used (to fund base benefits, reduce the unfunded liability or mitigate the City's annual required contribution) -- but not in any significant way, since using the funds to pay for base benefits would have the same effect as reducing the City's contribution. There is no conflict with Chapters 175 and 185, because the PFPF is "deemed to comply" with those chapters. And, as also noted above, there is no conflict with the 3.25% of payroll limitation on the future amounts that may be applied from the CBSA to reduce the City's annual contribution.

The savings clause of the CP again suggests that the benefit provisions are the product of collective bargaining and can be altered, potentially unilaterally by the City, after 3 years. The MA was silent on the issue of whether the benefit provisions were collectively bargained and, in any event, contained a City agreement to make no unilateral change for 10 years.

<u>CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14</u>:

Nothing in the Savings Clause suggests that the CP is a product of collective bargaining. The clause simply refers to a potential act by a court and states the intent to save the CP where possible. As with the MA, the CP provides that future pension negotiations shall be by the City and the Unions pursuant to collective bargaining.

The MA required the Mayor to submit the additional $40 million as part of his annual budget request but did not dedicate a funding source nor require the Council to appropriate the required budget request. The CP requires the Mayor to identify a permanent funding source and for that source to be enacted by the Council. The CP does not state whether that source could be diverted or repealed by a later Council before the payment of the liabilities under the CP ends.

CLARIFICATION FROM OFFICE OF GENERAL COUNSEL/JIM LINN as of 12/31/14:

> ***The agreement requires the City to implement a permanent funding source and does not take effect until such a funding source has been implemented. If the City breaches that obligation, the PFPF would have remedies as anyone who is party to a breached contract would have. Moreover, if the City pays the entire obligation up front as is permitted under the CP, this is not an issue.***

It is recommended that the Board carefully study the CP and compare it to the MA to determine, in the exercise of its fiduciary duty, if the CP is in the best interest of the members and beneficiaries of the Fund. It is further recommended that a special workshop(s) be held after the initial review to review the statutorily required actuarial impact study and to develop alternatives, if any, to the various changes represented by the CP. Once the Agreement is determined, work between Fund Counsel and the OGC will be required to assure that the ordinance reflects the Agreement.[2]

[2] In order to conclude the litigation in *Wyse v. City, et al*, it will be necessary for the Plaintiffs in that case to accept any final proposal and for the presiding judge to review it for fairness.