



## City of North Miami Beach Memorandum

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TO: Honorable Mayor George Vallejo  
Members of the City Council

CC: Ana Garcia, City Manager  
Mac Serda, Deputy City Manager  
Pamela Latimore, City Clerk

FROM: Jose Smith, City Attorney

DATE: April 2, 2015

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RE: City Provided Post-Service Insurance Benefits for Certain Elected Officials and Senior Management Employees

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I enclose attorney David C. Miller's report received today in reference to the above matter.

Mr. Miller's analysis and opinions rely on resolutions, transcripts, memoranda and other exhibits which are part of a large binder. The binder will be copied and delivered to you as soon as possible.

In the meantime, however, I am providing you with copies of exhibits which most directly relate to the issues at hand. Mr. Miller will be available at the April 7, 2015 City Council meeting to respond to questions.

JS/mmd

Enclosures

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April 2, 2015

**VIA HAND DELIVERY**

Jose Smith, Esquire  
City Attorney  
City of North Miami Beach  
17011 N.E. 19th Avenue  
North Miami Beach, Florida 33162

**Re: City-Provided Post-Service Insurance Benefits For Certain Elected Officials  
and Senior Management Employees**

Dear Mr. Smith:

You have requested our legal analysis and opinion regarding post-service insurance benefits provided by the City to certain elected officials and senior management employees. Specifically, you have requested that we review the history of those benefits, the scope of benefits presently provided, and whether those benefits may be modified. To prepare this opinion, we reviewed the current and relevant former versions of the City Charter and Code; relevant individual City Council Resolutions and Ordinances; former City medical insurance plans; correspondence and memoranda of former and current City officials; legal memoranda; communications and public records requests and responses from members of the community; relevant personnel files; discussions with City employees; recordings of certain City Council meetings; and applicable statutory and decisional law.

In addition to this opinion letter, we have provided a summary letter of the same date. The summary letter sets forth the reasoning and conclusions embodied in this letter, but in briefer, less formal, and less legalistic language. This letter constitutes our official opinion, of which the summary is a simplified reflection.

1. **Questions Presented.**

A. What is the history of post-service insurance benefits provided by the City to former elected officials and senior management officials?

B. What is the current scope of post-service insurance benefits provided by the City to former elected officials and senior management officials?

C. Are any current elected officials or senior management employees eligible or may they become eligible for post-service benefits? If so, what is the scope of such benefits?

D. May the benefits be modified for those former elected officials or senior management employees and beneficiaries presently eligible for the benefits? May they be modified for elected officials or senior management employees, if any, who may become eligible for them?

2. Executive Summary/Short Answers.

A. Post-service, City-provided insurance benefits for elected officials were offered by the City as early as 1986 by inclusion of the benefits in the City's employee medical insurance plans. Those plans appear to have been adopted by the City Council at times via the budget approval process and at times by non-budget resolutions. The scope of the benefits, and who might be eligible for them and on what conditions, has changed through the years. In 2008, the City Council adopted Resolution R2008-51, which adopted and incorporated an attachment that, among other things, detailed the existing benefits and, under the heading "Current Mayor And Council Benefits," set forth additional benefits. R2008-51 also eliminated post-service benefits for officials initially elected after October 1, 2008. Charter amendments approved by the voters in 2009 expressly "d[id] not affect" these benefits. Resolutions adopted in 2009 and 2010 modified insurance and other benefits for then-serving Council members, but did not address benefits for former elected officials.

Post-service, City-provided insurance benefits for senior management employees were offered by the City as early as 1998 by the adoption of Resolution R98-53. The scope of those benefits was expanded, clarified, or eliminated (for employees hired after October 1, 2008) by Resolutions R2000-10, 2002-30, and 2008-51. Additionally, Resolution R92-2 appears to adopt a version of a City-provided health insurance plan that provides for City-paid single coverage health insurance for life to any employee who served at least four years as City Manager, City Attorney, or City Clerk. The City Commission subsequently adopted later versions of health insurance plans; no resolutions, ordinances, or health plan documents after 1992 have come to my attention that include special benefits for these three positions. The City's practice is to treat individuals who formerly held these positions as governed by Resolution R98-53.

B. The current scope of the insurance benefits afforded by the City to former elected officials is based on the provisions of R2008-51 as that resolution has been interpreted and applied since its adoption. Individuals who were elected to at least four terms as Mayor or City Council or a combination of those offices became eligible, when their service ended, for "City paid single PPO health and dental insurance coverage or its equivalent ... ." These individuals could purchase dependent coverage at no cost to the City. Individuals who were serving as Mayor and on the City Council when R2008-51 was approved could be eligible for more benefits. Under R2008-51, they could become eligible for City-paid health insurance up to the PPO family coverage level and City paid dental insurance up to the cost of indemnity family coverage. Additionally, these individuals could become eligible for health insurance deductibles

and coinsurance amounts to "be waived ... as agreed by the health insurance carrier." Finally, these individuals could become eligible to "be reimbursed out-of-pocket expenses for health, dental and vision costs not covered by insurance." Eligibility was conditioned upon meeting specified requirements. Effective October 1, 2009, sitting Council members could participate in City-sponsored health insurance programs, but only at their full expense for all costs, including the total cost of premiums.

The current scope of the insurance benefits afforded by the City to former senior management employees is based on the provisions of R98-53 as that resolution has been interpreted, modified, and applied since its adoption. Eligible senior management employees hired before October 1, 2008, may participate post-service in City health, dental, and vision insurance at a premium cost partially paid by the City according to a sliding scale based on years of service. Such employees hired after October 1, 2008, are not eligible for this benefit, but may participate post-retirement in City health benefits on the same terms as other City employees, at their own expense.

C. No presently serving or future elected officials are or can become eligible for the post-service benefits without some further action by the City Council. R2008-51 provided certain benefits that the then-serving Mayor and Council members could become eligible for post-service if they met certain conditions. Those conditions were (1) being initially elected before October 1, 2008, and (2) being elected to four terms. Of those then-serving members, two had not been yet been elected to four terms at that time. Under R2008-51, if they had subsequently been elected to at least four terms and then ended their service, they could have become eligible for the benefits. However, the Council adopted Resolution R2009-57 on September 27, 2009, which eliminated city paid health care benefits for all current and future elected officials. Also, on June 1, 2010, the Council adopted Resolution R2010-41, which permitted Council members to participate in City insurance programs at the members' sole expense. It further stated that unless a benefit was enumerated in R2010-41, then it was not a part of the Council compensation package. Those benefits included pay and expense reimbursement. Insurance was to be at the member's expense. Accordingly, and as explained below, the Council has eliminated the benefits as set forth in R2008-51 for any Council member who might otherwise have become eligible.

Senior management employees hired before October 1, 2008, who have not yet separated from the City may become eligible to receive health benefits under Resolution R98-53, as modified, when they terminate employment from a qualifying position. The scope of those benefits would be as explained in C, above, and in the detailed discussion below. Presently serving senior management employees hired after October 1, 2008, are not eligible for those benefits.

D. For the reasons explained below, we have concluded that the benefits were validly conferred and those individuals who had met the conditions for eligibility before the adoption of R2009-57 and R2010-41 have legally vested in the benefits. Because the benefits are substantive vested rights for such individuals, the City may not reduce or eliminate the benefits without

potentially violating the individuals' constitutional rights. Moreover, it is possible that the City would be equitably estopped from doing so.

For the reasons explained below, we have concluded that the benefits were validly conferred and those now-separated senior management officials who have met the conditions for receiving the benefits have legally vested in the benefits. Because the benefits are substantive vested rights for such individuals, the City may not reduce or eliminate the benefits without potentially violating the individuals' constitutional rights. However, the City may legally modify or eliminate the benefits for still-serving senior management employees who would otherwise be potentially eligible for the benefits upon separation.

### 3. Detailed Chronology.

In 1985, the City adopted a group medical insurance plan for its employees, provided by Humana. *See* Tab 11, § 1; Tabs 3-5.<sup>1</sup> The plan was apparently readopted annually through either the budget approval process or by resolution. *See* Tab 11, § 1. A plan amendment effective April 15, 1986, included an eligibility clause providing that City Council members who had served four terms or eight years could remain covered by the plan after their service ended, on the same terms as current employees. Tab 1. If the former member elected dependent coverage, the dependents could remain on the plan even after the former member died, so long as they were otherwise eligible under the plan. *Id.*

There is an unsigned letter dated October 27, 1986, requesting the above provision be modified to eliminate the language relating to offering the plan on the same terms as to current employees. Tab 2. There is no indication whether this change was authorized by the Council or whether it was implemented by Humana.

The plan was readopted by Resolution R92-2 on October 20, 1992. Tab 6. Apparently attached to R92-2 is another version of this eligibility provision. *See* Tab 6 (It is not clear whether this document was, in fact, attached to the Resolution; as such care must be taken in drawing firm conclusions from it). The provision adds the City Manager, City Attorney, and City Clerk to the list of eligible officials, makes the former Council members and the officials "entitled" to the benefit for life, and at no cost. *Id.* (No other document reviewed includes such a provision. In any case, later-adopted resolutions and medical plans would have superseded this provision, at least for then-serving and later-serving employees.)

Resolution R98-53 extends certain benefits to a defined class of "senior management officials" who are not eligible to participate in the City's general employee or police and fire pension plans. *See* Tab 8. Included is eligibility to participate post-employment in the health

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<sup>1</sup> Accompanying this letter is a selection of relevant documents that will be cited herein by tab number and, where needed for clarity, internal section or page references. These documents are identified and briefly described below in Section 4, "Summary of Documents."

plan according to a sliding scale of eligibility and discounted premiums based on years of service and age. *Id.* Ordinance 2000-10 clarifies that dental and vision coverage were to be included, as well, and adds life insurance coverage for senior management. *See* Tab 9. Ordinance 2002-30, which authorizes adoption of a retirement plan for management employees, provides that it has no effect on the senior management post-service health benefits and provides that a department head's or assistant department head's participation in a City retirement plan shall not preclude receipt of such benefits. *See* Tab 10, § 9.

In mid-2006, the City apparently entered into purported individual contracts with seven current or former Council members. Tabs 19-25. Under the contracts, the individual is provided health, dental, and vision insurance upon termination of service. *Id.* The City pays the entire premium for single coverage; if "couple" coverage is elected by the individual, the individual pays the incremental cost above the single coverage premium amount. *Id.* No other form of coverage is offered. If the individual predeceases the spouse, coverage for the spouse continues. *Id.* All coverage is secondary to Medicare when the individuals become eligible. *Id.* No resolution or ordinance adopting these contracts, which were signed by the City Manager, has been found.<sup>2</sup>

In 2008, Resolution R2008-51 was adopted. It incorporated an attached memorandum by the City Manager that detailed post-service insurance benefits then offered to current and former Council members and senior management officials. *See* Tab 12. Among other things, the memorandum stated that Council members elected to four terms were entitled to City-paid single coverage for health, dental and vision insurance and to dependent coverage at the individual's own cost. *Id.* The memorandum recommended discontinuing these benefits for Council members initially elected after October 1, 2008. *Id.* It further recommended discontinuing City-subsidized post-termination benefits for senior management officials newly hired after October 1, 2008. *Id.* The memorandum also recommends that "Current Mayor and Council" should have City-paid health and dental insurance, should have health insurance deductibles and coinsurance waived, and that they should be reimbursed for out of pocket health, dental, and vision medical costs not covered by insurance.<sup>3</sup> *Id.* The adoption of this Resolution gave the memorandum the force of municipal law. The Resolution also eliminated the senior management post-service health insurance benefits for employees hired after October 1, 2008.

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<sup>2</sup> Resolution 2005-40, at Section 2, states: "Authorizing the City Manager to execute standard health care policies and individual benefits contracts." The individual contracts were executed about a year later. Whether this language is specific enough to authorize the City Manager's execution of the individual contracts is arguable.

<sup>3</sup> The discussion of this item among Council members and an explanation on the record by the City Attorney makes it clear that the "Current Mayor and Council Benefits" were to vest upon election to four terms and were not intended to currently vest in those members who had not yet been elected to four terms. *See* Tab 26, *passim*, 6:16-20, 7:9-18, 10:2-13, 13:1-10,

In May 2009, the City Charter was amended by referendum and provided that insurance benefits could be City-paid for Council members only during their terms of office. *See* Tab 13; *see also* Tab 14, page 1. The amendment further stated: "This provision *shall not affect* continuing City Council benefits previously established and available to active or former members of City Council elected for at least one term of office prior to the election of May 2009." Tab 13, § 2, page 5 (emphasis supplied). By its plain language, the provision has no legal effect on the referenced benefits. It neither eliminates them nor vests them; it leaves them untouched. Resolution R2009-57, adopted after the election, eliminated City-paid health care benefits or payments for deductibles and coinsurance for all current and future elected officials.<sup>4</sup> *See* Tab 14. Resolution R2010-41 provided that current elected officials could participate in City health insurance plans, but at their own expense and eliminated any compensation not enumerated in that resolution. *See* Tab 15.

The current understanding and practice of the City as to former elected officials is based on Resolution R2008-51. *See* Tab 18. Those elected officials who were elected to four terms and whose initial election was before October 1, 2008, are provided post-term health, dental, and vision single coverage at no premium cost to them, with the option to add dependent coverage at their own cost. Senior management officials hired before October 1, 2008, are afforded or eligible for post-termination coverage subsidized by the City according to the table in R98-53. *Id.*; *see also* Tab 8, § 5.

To summarize: The City provides benefits to former members of the City Council (who were elected to four terms) who were initially elected before October 1, 2008. This group is offered lifetime single coverage health and dental insurance with premiums fully paid by the City and is also offered dependent coverage at their own cost for eligible dependents. Dependent coverage may be continued after the member's death. Additionally, R2008-51 provided for insurance benefits for the then-serving Mayor and Council members that obligated the City to pay all co-pays and coinsurance amounts and to reimburse any out of pocket expenses for those individuals. It appears that these additional benefits have been offered post-service to those individuals. *See* Tab 18. The 2009 Charter amendment had no effect on these post-service benefits. The Council's actions in R2009-57 and R2010-41 eliminated the benefits for any Council member who was then serving but not yet vested – that is, who was initially elected before October 1, 2008, but who had not yet, but might still have been elected to four terms. Thus, no one can now become eligible for the benefits set forth in R2008-51.

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<sup>4</sup> It is clear from the recorded discussion of this Resolution, which was extensive, that the effect of the Resolution in eliminating entitlement to these benefits from the then-sitting Council members was understood. *See* Tab 27, *passim*, 4:8-16, 6:12-7:3, 9:7-8, 11:17-22, 14:5-9, 17:6-8, 19:13-14, 26:15-16, 27:1-14, 28:19-23, 40:11-16, 42:12-13, 52:8-9, 54:19-55:1, 61:11-15, 68:9-12.

4. Summary Of Documents.<sup>5</sup>

This list identifies the relevant documents and gives, in brackets, a short description. Particularly salient language is excerpted. It is important that these excerpts be read in the context of the full documents and not relied upon out of context.

**Tab 1. Amendment #5 to City Plan Document, Effective April 15, 1986, Executed Sept. 16, 1986**

[This document appears to amend the health insurance plan in effect for City employees effective April 15, 1986, in various respects. It is executed by then-City Manager Whitaker.]

**“3.3.1 Eligibility**

“Council members who have served four terms or eight years on the city council are eligible to continue to be covered by the plan as any other employee, after their term of office has expired. Dependents, of a council member who has met the four terms or eight year qualification, who meet all other eligibility requirements may continue on the plan even though the council member is deceased.”

**Tab 2. Unsigned Letter, Oct. 27, 1986**

[Unsigned letter on plain paper (not letterhead) from Deputy City Manager Michael Roberto to Rick Crable of Adjustco, Inc., requesting a change to the eligibility section of the Health Plan Document, retroactively effective to April 15, 1986.]

“Council Members who have served four terms, or eight years, on the City Council will continue to be covered by the Plan, if their term of office has expired. Dependents of Council members who have met the four term/eight years qualification who meet all other eligibility requirements, may continue on the Plan, even if the Council member is deceased.”

**Tab 3. Certificate of Insurance, July 19, 1993**

“Elected officials who have been elected to four (4) terms, and are in good standing, as a Mayor or City Council Member of the City of North Miami Beach, shall be entitled to receive individual health insurance adopted by the City for its employees at no cost to the individual. The costs borne by the City will only be within the guidelines of the Plan Document. All other expenses outside the Plan Document will be paid by the elected official leaving office.

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<sup>5</sup> A number of possibly relevant documents, notably some of the insurance plan documents in effect before the mid-2000s, could not be located. This analysis is based on the available documents.



"For as long as the former elected official is alive, dependent coverage may be purchased at the same rate as that available to other City employees."

**Tab 4. Certificate Of Coverage, undated**

"Elected officials who have completed four terms, or eight (8) years, as a City Council Member of the City of North Miami Beach and any person having completed five years of full time employment with the City, four years of which must have been in the capacity of either the City Manager, City Attorney, or City Clerk, shall be entitled to receive individual health insurance throughout their lives from the City at no cost to the individual.

"Dependent coverage may be purchased at the same rate as that available to other City employees that are entitled to purchase dependent coverage.

"Dependents who meet all other eligibility requirements, may continue on the Plan even though the Elected Official, City Manager, City Attorney, or City Clerk is deceased."

**Tab 5. Certificate Of Coverage, undated**

"Elected officials who have been elected to four (4) terms, and are in good standing, as a Mayor or City Council Member of the City of North Miami Beach, shall be entitled to receive individual health insurance adopted by the City for its employees at no cost to the individual. The costs borne by the City will only be within the guidelines of the Plan Document. All other expenses outside the Plan Document will be paid by the elected official leaving office.

"For as long as the former elected official is alive, dependent coverage may be purchased at the same rate as that available to other City employees."

**Tab 6. R92-2, Oct. 20, 1992**

[Adopts Health Plan; Apparently attached is an undated excerpt of the Health Plan with an "Insert." The effective date of this document is not clear.]

"Insert For Elected officials, City Manager, City Attorney, and City Clerk

"Elected officials who have completed four terms, or eight years, as a City Council Member of the City of North Miami Beach and any person having completed five years of full time employment with the City, four years of which must have been in the capacity of either the City Manager, City Attorney, or City Clerk, shall be entitled to receive individual health insurance throughout their lives from the City at no cost to the individual.

"Dependent coverage may be purchased at the same rate as that available to other City employees that are entitled to purchase dependent coverage.

"Dependents who meet all other eligibility requirements, may continue on the Plan even though the Elected Official, City Manager, City Attorney, or City Clerk is deceased."

**Tab 7. R93-30, Nov. 2, 1993**

[Adopts Health Plan; no attachment.]

**Tab 8. R98-53, Dec. 15, 1998**

[Provides for senior management employees to purchase city health insurance at a discount post termination and to add dependent coverage at full cost.]

"WHEREAS, the City of North Miami Beach provides certain retirement benefits to employees eligible to participate in the General Employees Retirement Plan, to wit, the right to purchase health, dental, life insurance and other similar benefits and desires to extend these benefits to full time employees of the City who are exempt from the Fair Labor Standards Act and who are not eligible to participate in the General Employees Retirement Plan, or the Police Officers and Fire Fighters Retirement Plan, subject to specified eligibility criteria."

\* \* \*

"Section 5. Management level personnel, i.e., department heads and assistant department heads in the full time continuous employ of the city for at least two years, not otherwise in either the General Employees or the Police Officers and Firefighters Pension Plans, upon terminating employment with the city for any reason other than criminal malfeasance in office shall be entitled to purchase PPO (or equivalent) health care coverage in the City's healthcare group plan pursuant to the following (Rule of 60) table of eligibility and cost:

[Table of eligibility and percentage of premium paid by employee, with maximum employer portion set at 80 percent at 40 years of age and 20 years of service.]

"An eligible employee who purchases health insurance pursuant to this Resolution may also purchase spouse or family coverage at full cost to the employee. The insured spouse and/or family of an employee who dies during this period of continued inclusion and coverage with the City shall be allowed to continue in the group at their own cost."

**Tab 9. Ord. No. 2000-10, Oct. 17, 2000**

[Clarifies that senior management employees identified by R98-53 also are eligible for dental and vision insurance and any other coverage available to retiring City employees, all subject to the table of eligibility and cost in 98-53; adds free life insurance for such employees in the amount of \$10,000 after 10 years' service and \$15,000 after 15 years.]

**Tab 10. Ord. No. 2002-30, Jan. 7, 2003**

[Establishes pension plan for management employees; preserves non-pension benefits.]

“Section 9. This ordinance shall have no effect on non-pension management benefits previously established or granted. Participation either as a member or as a retiree in any City sponsored pension plan shall not preclude receipt of non-pension benefits granted to department head and assistant department head personnel.”

**Tab 11. R2005-40, June 21, 2005**

[Readopts Health Plan; no attachment. Indicates Health Plan was first adopted in 1985 and sometimes was adopted through budget resolutions.]

“Section 1. The Mayor and Council of the City of North Miami Beach hereby authorize and adopt the City of North Miami Beach Employee Health Care Plan for the health, well being and benefit of all eligible city legislative/administrative/employee participants, as previously adopted through resolution and budgetary approvals from 1985 forward.”

**Tab 12. R2008-51, Nov. 4, 2008**

[Sets forth entitlement to benefits for elected officials in a memorandum incorporated into the resolution, including the eligibility requirement of election to four terms; discontinues free benefits for those first elected after 2008; discontinues free benefits for senior management who are initially hired after 2008; retains any vested rights for those who have them – without definition or identification of who might have them or how. Entitles current elected officials to city-paid premiums and city-paid out of pockets for life for any level of coverage up to family coverage.]

**Tab 13. R2009-12, Feb. 17, 2009**

[Approves Charter amendments for election for May 5, 2009. Changes Council terms from 2 to 4 years beginning in 2011 or 2013, depending on group, limits services to no more than 8 consecutive years. Provides that insurance benefits for elected officials shall only be paid during their terms and thereafter only at the individual's expense. Provides that this last shall not apply to elected officials initially elected before May 2009.]

“Sec. 26. Compensation

\* \* \*

“Insurance benefits provided to members of City Council shall only be paid for by the City during their actual term of service. After their term of service, councilpersons may be offered the opportunity to remain in the City's insurance plan(s) at their own expense. This provision shall not affect continuing City Council benefits previously established and available

to active or former members of City Council elected for at least one term of office prior to the election of May 2009.”

**Tab 14. R2009-57, Sept. 22, 2009**

[Recites that Charter amendments on health benefits passed in May 5, 2009, election. Affects insurance benefits for elected officials.]

“WHEREAS, even though all members of the City Council are entitled to health benefits, only four members participate in the City Plan; and

“WHEREAS, the 14th Amendment to the U.S. Constitution guarantees similarly situated individuals to be treated equally; and;

“WHEREAS, in order to comply with the Constitution, the Mayor and City Council do not want to give different treatment to each member of the City Council; and

“WHEREAS, in keeping with the spirit of the voters of the City of North Miami Beach, the Mayor and Council believe that City paid health care benefits, health insurance deductibles, and coinsurance should be paid for by each elected official and not the City of North Miami Beach ...”

\* \* \*

“Section 2. City paid health care benefits for all current and future elected officials shall be eliminated.

“Section 3. City paid health insurance deductibles and coinsurance for all current and future elected officials shall be eliminated.”

**Tab 15. R2010-41, June 1, 2010**

[Sets Mayor’s annual compensation at \$3,600 in salary with \$26,999 in expenses and \$1,200 in Charter allowance; Council member’s annual compensation at \$3,000 in salary with \$23,999 in expenses.]

“Section 3. Council members shall be eligible to participate in any insurance program and dental insurance program available to City employees. Each Council member shall have the option of electing to have coverage in any insurance, at the Council member’s sole expense.

“Section 4. The foregoing represents the entire Council compensation package. If a benefit or payment is not enumerated herein it shall no longer be part of the Council compensation package.”

**Tab 16. Ordinance No. 2012-33, Jan. 15, 2013**

[Amends General Management Pension Plan to change various benefits and procedures.]

**Tab 17. Legal Opinion Letter, Oct. 21, 2008**

[Addresses in a general fashion hypothetical legal consequences of changes to benefits provided by R98-53 and Ord. No. 2000-10. Is not predicated on any specific or proposed action.]

**Tab 18. Memorandum, Dec. 11, 2013**

[Addresses then-current status of post-employment insurance benefits offered or provided to elected officials and certain senior management employees. Calculates a total annual premium cost of \$140,527.44, an annual contribution to the OPEB Trust of \$250,000.00 and a potential additional premium cost for eligible or potentially eligible individuals of \$61,390.62.]

**Tabs 19-25. Individual Insurance Benefits Agreements, May-June, 2006**

[Operative language in each is identical. In consideration of current or past service as an elected official of the City, the individual is provided health, dental, and vision insurance upon termination of service. The City pays the entire premium for single coverage; if "couple" coverage is elected by the individual, the individual pays the incremental cost above the single coverage premium amount. No other form of coverage is offered. If the individual predeceases the spouse, coverage for the spouse continues. All coverage is secondary to Medicare when the individuals become eligible.]

**Tab 26. Transcript of City Council Meeting, Discussion of Resolution R2008-51, Nov. 4, 2008**

This excerpt includes the entire discussion during this meeting from introduction to passage of the Resolution.

**Tab 27. Transcript of City Council Meeting, Discussion of Resolution R2009-57, Sept. 22, 2009**

This excerpt includes the entire discussion during this meeting from introduction to passage of the Resolution.

5. Analysis.

- A. There is no apparent basis upon which to find that the legislative acts conferring the benefits were invalid.

Article VII, section 10 of the Florida Constitution prohibits the state and its subdivisions from using their taxing power or pledging public credit to aid any private purpose or entity. The courts have found that under Article VII, section 10, the expenditure of public funds, regardless of the source of those funds, must satisfy a public purpose. *Linscott v. Orange County Indus. Dev. Auth.*, 443 So. 2d 97, 101 (Fla. 1983); *Orange County Indus. Deve. Auth. v. State*, 427 So. 2d 174 (Fla. 1983). The Attorney General has stated that it is the responsibility of the legislative body of the local government to make the appropriate findings that an expenditure serves a public purpose. Op. Atty. Gen. of Florida 2004-37. For example, the Attorney General also has opined that it was a legislative determination whether to expend public funds for an incentive award program for government employees in recognition of job-related achievements, to pay for retirement dinners, and to pay for coffee and refreshments for visitors. Op. Atty. Gen. of Florida AGO 83-05.

The ordinances and resolutions authorizing, adopting, clarifying, modifying, or eliminating the medical insurance benefits through the years have all included at least brief findings relating to the public purpose of the action. See Tabs 6-16. It is our opinion that these findings likely would be sufficient to establish a public purpose to support the validity of the actions in this regard.

Cities generally have the authority to provide compensation to their elected officials, including health care benefits. The Attorney General has opined that cities may not only provide salaries to elected officials as authorized under Florida Statutes Section 191.005(4), but may provide other benefits, such as health insurance premium payments. See Op. Atty. Gen. of Florida 2004-17 (citing Fla. Stat. § 112.08(2)(a)).

Additionally, the City Council's actions must be authorized under the City Charter. The Charter, both before and after the amendments of 2009, gave authority to the City Council to determine the compensation of elected officials. Section 26 of the City Charter, both before and after the amendments in 2009, states in pertinent part: "Members of the city council shall receive such compensation as shall be fixed by the council. ... After said election in the year 1961 the compensation of members of the city council may be increased by the affirmative vote of five members of the council." Thus, Section 26 of the Charter provides the City Council with the authority to determine the compensation of the elected officials. To the extent the health insurance plans that included the provisions for elected officials were approved by the City Council, the plans would be in compliance with the City Charter.

The Charter also vests authority in the City Council to establish health insurance plans for employees and enter into contracts to secure such insurance. Art. XIII, § 81 "Pensions." The Florida Statutes also provide authority for municipal employees and retirees to participate in municipal group health insurance plans. See Fla. Stat. §§ 112.08, 112.0801.

In conclusion, we are not aware of a basis for a challenge to the validity of the actions providing medical insurance benefits to elected officials or senior management employees.

- B. The benefits constitute a substantial right that, once vested, may not be impaired by the City absent a compelling state interest and the use of the least restrictive means.

The legal concept of vested rights is well-established and widespread. A “vested right” is an immediate and fixed right of present or future enjoyment. *E.g., Gleason v. Gleason*, 256 N.E. 513 (N.Y. 1970). The cases include many formulations of this same basic idea.

A vested right is an immediate right of present enjoyment or a present, fixed right of future enjoyment. *Div. of Workers’ Compensation v. Brevda*, 420 So. 2d 887 (Fla. 1st DCA 1982). A right becomes vested when it has become so far determined that nothing remains to be done by the party asserting it. *Ridgewood Development Co. v. State*, 294 N.W. 2d 288 (Minn. 1980). A vested interest is one with a present, legal, and existing right of alienation. *Baldwin v. Fleck*, 168 S.W.2d 904 (Tex. App. 1943). Put succinctly:

A vested right has been defined as an immediate, fixed right of present or future enjoyment and also as an immediate right of present enjoyment, or a present, fixed right of future enjoyment. [T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand.

*R.A.M. of S. Fla., Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2d DCA 2004), quoted in *Gulf Atlantic Office Properties, Inc. v. Dep’t of Rev.*, 133 So. 3d 537, 539 (Fla. 2d DCA 2014).

By contrast, rights that are contingent or conditional are not vested rights: Contingent interests do not constitute vested rights. *Cavett v. Peterson*, 688 P.2d 52 (Okla. 1984). Rights are contingent when the event upon which they are limited to take effect remains uncertain. *Anderson v. Menefee*, 174 S.W. 904 (Tex. App. 1915). To be vested, a right must be absolute, complete, or unconditional, and independent of contingency. *Rousselle v. Plaquemines Parish Sch. Bd.*, 620 So. 2d 946 (La. App. 1993).

If the legislature expresses a clear intent to bind itself, the law will be interpreted to create vested rights. *National Education Association v. Retirement Board*, 172 F.3d 22 (1st Cir. 1999). However, a present legislature cannot forever bind future legislatures, which may prospectively modify rights that have not yet vested. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013); see also *Gulf Atlantic*, 133 So. 3d at 539.

i. Benefits for Elected Officials.

Resolution R2008-51 provides that “all former and/or current elected officials ... shall retain the right, upon termination of their service, to receive all benefits earned during the course

of their service to the City.” It further provides that “[c]urrently serving mayor and councilpersons *shall be provided* healthcare and insurance benefits as specified in Exhibit “A” ...” Tab 12 (emphasis supplied). This mandatory language evinces an intent to bind the City to provide the benefits set forth in the exhibit. The exhibit uses language such as “will be entitled,” “will be provided,” and “will be reimbursed” when referring to benefits for elected officials. This mandatory language of grant also indicates an intent to be bound.

However, the grant in R2008-51 was also made conditional. The official must be elected to four terms and must have been initially elected before October 1, 2008. If the official meets these conditions, then, upon the end of his or her service, then and only then do the benefits become vested. Failure to achieve these conditions would eliminate the possibility that the official may receive the benefits. The mandatory language referenced above is couched in the future tense and plainly contemplates that the benefits become available only after the conditions are met. Because the official may fail to become entitled to the benefits, the right created is a contingent right that is capable of being defeated, i.e., taken away. The case law cited above, from various areas of law, makes it clear that a defeasible right is not a vested right. Likewise, a defeasible benefit or “mere expectancy” is not one in which a public employee may acquire an entitlement. Further, the cases state that the courts will presume that a statute does not create a vested right unless the vesting is clearly intended. This conforms with the statutory provision under ERISA, which governs private-sector employee welfare plans, like insurance, which states that the “default” position is that welfare benefits are not vested unless there is clear and express language to the contrary.

Given all of the above, I conclude that 2008-51 did not create a present vested right to the insurance benefits they offered for those sitting Council members who had not yet been elected to four terms. Instead, they created contingent rights that could ripen into vested rights when the official met the eligibility conditions.

Even if the rights of these individuals were vested, which is not the case, the City Council still could abrogate them by a legislative act – the resolutions – if such acts could bear constitutional substantive due process scrutiny. Under Florida’s Constitution, a citizen’s rights may not be abrogated by the state without the observance of substantive due process, which protects all rights against abrogation by government. *Dep’t of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991). If a legislative act abrogates a fundamental right, strict scrutiny will be applied to determine whether the citizen’s constitutional rights have been violated. *In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233 (Fla. 1992). However, legislative abrogations of rights that are not fundamental are subject only to the rational basis test, which merely requires the court to determine whether the law bears a reasonable and substantial relation to its stated ends and is not discriminatory, arbitrary, or oppressive. *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000).

It has long been recognized that there is no fundamental right to public employment or the emoluments thereof. *Board of Regents v. Roth*, 408 U.S. 564 (1972); see *Hudson v. City of Riviera Beach*, 982 F.3d 1318 (S.D. Fla. 2013). As such, the City’s resolutions eliminating the



lifetime insurance benefits for current Council members in 2009 and 2010 need merely bear a reasonable relationship to their purpose and not be arbitrary, discriminatory, or oppressive. The purpose of the elimination of the benefits is stated in the resolutions as relating to financial pressures and to the desire to treat similarly situated individuals equally. Eliminating or regulating the expense of insurance benefits is reasonably and substantially related to regulating finances. The resolutions apply to the entire class of current and future Council members, so there is no discrimination or arbitrariness. It is difficult to see how an argument could be made that eliminating lifetime free health insurance, a rare benefit, could be oppressive. Accordingly, we conclude that, even if the individuals had vested rights that were abrogated by the resolutions (which is not the case), the City's actions still could survive constitutional scrutiny.

Moreover, this is not the end of the analysis. In *Scott v. Williams*, the Florida Supreme Court reasoned – in a case about retirement benefits – that legislative actions could not operate as forever binding future legislatures. Such a doctrine, it essentially reasoned, would mean that no future legislative body could ever modify benefits even for employees who had not yet earned the benefits and were not yet vested in those benefits. *Scott*, 107 So. 3d at 388 (relying on *Florida Sheriff's Ass'n v. Dep't of Admin.*, 408 So. 2d 1033 (Fla. 1981)). In that case, the Legislature had, by statute, required members of the Florida Retirement System (“FRS”) to begin contributing to the retirement fund – no contributions were required on service time already accrued. Employees sued, claiming that the the law governing the FRS vested in them the right not to have to contribute to their retirement. The Supreme Court rejected that argument for the reason stated above. Further, a law that creates a right, but does not also create an “immediate, fixed right of present or future enjoyment” of that right, creates a mere expectation of the continuance of the present law. Such an expectation cannot support a cause of action if the law is changed and the expectation is taken away by that action. *Florida Hosp. Waterman Inc. v. Buster*, 984 So. 2d 478, 490 (Fla. 2008) (citations omitted).

In this case, R2008-51 created a conditional or defeasible right to medical benefits. Until the elected official who was first elected before October 1, 2008, achieved election four times, the official could not claim entitlement to the benefits at the end of his or her service. Until the successful outcome of the fourth election, it was always possible that the official would not achieve the required four elections to office. Thus, the right was contingent and could be removed by the same authority under which it was made potentially available – action of the City Council. That action was taken in both R2009-57 and R2010-41. Both resolutions eliminated either “all” City-paid insurance benefits (R2009-57) or eliminated any benefit not enumerated in the resolution – which did not include these lifetime benefits (R2010-41). See Tabs 14, 15; see also Tabs 26, 27.

To summarize, certain former elected officials fulfilled the conditions and vested in the benefits. There were two individuals who could have become vested, but before they did, the possibility was lawfully removed.

ii. Benefits for Senior Management Employees.

The legal concepts discussed above apply equally to the benefits offered to certain senior management officials under Resolution R98-53<sup>6</sup>, as modified.

The relevant resolutions state, in pertinent part:

Resolution No. 98-53 (Tab 8):

Section 5. Management level personnel, i.e., department heads and assistant department heads in the full time continuous employ of the city for at least two (2) years, not otherwise in the General Employees or the Police Officers and Firefighters Pension Plans, upon terminating employment with the city for any reason ... shall be entitled to purchase continued ... health care coverage in the City's healthcare group plan....

[The Resolution thereafter sets forth a sliding scale whereby the eligible former employee pays only a portion of the premium based on years of service and age, which must sum to 60 for eligibility for any City-paid portion of the premium. The City-paid portion increases with increasing years of service, to a maximum of 80 percent with 20 or more years of service (and a minimum age of 40 to meet the rule of 60).]

Ordinance No. 2000-10 (Tab 9):

Section 5. Long term management level employees retiring or otherwise separating from city service, eligible for continuous health care coverage, as provided by City of North Miami Beach Resolution No. 98-53, shall also be eligible for continued dental/vision care insurance and/or any other coverage available to other retiring City employees, pursuant to the table of eligibility

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<sup>6</sup> Resolution R92-2, as noted above, has apparently attached to it a health plan document that includes lifetime City-paid benefits for qualifying individuals who served as City Manager, City Attorney, or City Clerk. It is unclear from the documents I was able to review whether that document is, in fact, the document referred to in the Resolution. No other document was found that refers to such benefits for these positions. Later-adopted health plans do not include such benefits, nor do later-adopted resolutions or ordinances addressing this subject. These later adoptions would supersede the plan apparently adopted in 1992. However, it cannot be determined exactly when this provision was superseded because no health plans adopted between 1992 and 2008 were provided for review and reviewed to see whether they include or remove this provision. The plan adopted in 2008 did not include such a provision for former City Managers, Attorneys, or Clerks.

and cost established in Resolution No. R98-53, as well as to Ten Thousand Dollars of term life insurance coverage at no cost to the employee, after 15 years of service, and an additional Ten Thousand Dollars of term life insurance coverage at no cost to the employee, after 20 years of service.

Ordinance No. 2002-30 (Tab 10):

Whereas, the City Council ... finds the long-term tenure of its management employees to be in the best interests of the Agency....

Whereas, the City Council finds that the establishment of a retirement plan and trust for the management employees of the City of North Miami Beach attracts qualified employees ....

Section 9. This ordinance shall have no effect on non-pension management benefits previously established or granted. Participation either as a member or as a retiree in any City sponsored pension plan shall not preclude receipt of non-pension benefits granted to department head and assistant department head personnel.

The operative language in Resolution R2008-51 (Tab 12) states, in pertinent part:

Section 2. Subject to the eligibility criteria and vesting schedules established in Resolution Nos. R93-30<sup>7</sup> and R98-53, as clarified by Section 5, Ordinance No. 2000-10, all former and/or current elected officials and eligible employees shall retain the right, upon termination of their services, to receive all benefits earned during the course of their service to the City.

\* \* \*

- Discontinue City paid health & dental benefits for Sr. Management employees hired after October 1, 2008. A Sr. Manager who qualified for pension benefits from a City sponsored pension plan will be entitled to health benefits afforded to all other employees at no premium cost to the City. Employees who

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There are no eligibility criteria or vesting schedule set forth in Resolution 93-30. See Tab 7. The Resolution incorporates by reference a health care plan that is stated to be attached to the Resolution. No copy of the attachment was available. Any such eligibility criteria or vesting schedule would be superseded by later-adopted plans, resolutions, or ordinances that differed from them.

separate for reasons other than retirement will be subject to COBRA only.

- Per Resolution R98-53 and Ordinance 2000-10, Section 5, current and former management level employees retain all property rights acquired and/or vested in separation benefits.

The sum effect of these provisions prior to Resolution 2008-51 is to provide health, dental, and vision insurance benefits to senior management employees who terminate employment for reasons other than criminal malfeasance in office. To be eligible, the former employee must satisfy the age and years of service requirement set forth in the Resolution. *See* Tab 8, § 5 (table). The insurance is made available to the former employee at a reduced premium cost. The City pays a percentage of the premium according to a sliding scale based on the former employee's age and years of service. *Id.* Life insurance is also provided at City expense, with eligibility and amount based on years of service. *See* Tab 9, § 5. Resolution R2008-51 restricts these benefits to otherwise eligible employees hired before October 1, 2008.

In addition to the language of the memorandum incorporated into Resolution R2008-51 and quoted above, the Resolution also states that the Council intends to "acknowledg[e] and respect[] vested property rights of former and/or current employees," (Tab 12, page 1), and "all former and/or current elected officials and eligible employees shall retain the right, upon termination of their service, to receive all benefits earned during the course of their service to the City," *Id.*, § 2.

As with the benefits offered to former elected officials, these benefits offered to senior management officials vest only upon termination of employment. Further, the terminating employee must meet the eligibility criteria, that is, he or she must hold an eligible position at the time of termination, must not be terminated for malfeasance in office, and must satisfy the age and years of service requirement.

To amplify, the Resolution and the Ordinances all speak in present terms of management level personnel and their entitlement to the benefits upon separation. Resolution 98-53 defines "management level personnel" as department heads and assistant department heads and states: "Management level personnel ... upon terminating employment shall also be eligible ..." for the listed benefits. Ordinance 2000-10 states: "[M]anagement level employees retiring or otherwise separating from city service ..." shall receive benefits. Ordinance 2002-30 speaks of "benefits granted to department head and assistant department head personnel." All of these formulations and others in the measures refer to management level personnel as management level personnel and not as former or onetime or once-serving management level personnel. Moreover, the operative language invariably links "management level personnel" to "terminating," "retiring," or "separating" in the same sentences. The language plainly confers the benefits upon an individual who is separating from a presently held management-level position and at the time of separation.

Like the benefits offered to former elected officials, these senior management benefits are subject to defeasance up until the moment of termination. An employee could fail to meet the age and service requirements when terminated. The employee could be terminated for malfeasance. The employee could be transferred to a non-qualifying position before termination. Thus, because the benefits are contingent upon satisfying conditions that may or may not occur, the benefits cannot vest while the employee is still employed. The "vesting" and "property right" language in Resolution R2008-51 does not operate to vest any rights. It merely refers to unspecified rights – if they exist – that are not disturbed. This language is in the nature of saying, "if the employee has a right, he or she still has that right." It does not confer or vest anything.

Also as with the discussion of the elected officials' benefits, those former senior management employees who met the criteria upon termination have vested in the benefits. The benefits may not be taken from those individuals without potentially violating their rights. However, the benefits may be eliminated for those senior management employees who were hired before October 1, 2008, and remain employed, because the benefits have not ripened into vested rights.

6. Conclusion.

A small number of former elected officials and a larger number of former senior management employees are vested in insurance benefits as described above. Because the benefits are substantial rights, the City cannot impair those rights without a compelling state interest and use of the least restrictive means to do so. Two currently serving elected officials who might have become vested in the benefits failed to do so before the benefits were eliminated.

Sincerely,

**BRYANT MILLER OLIVE P.A.**

  
David C. Miller

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April 2, 2015

**VIA HAND DELIVERY**

Jose Smith, Esquire  
City Attorney  
City of North Miami Beach  
17011 N.E. 19th Avenue  
North Miami Beach, Florida 33162

**Re: Summary: City-Provided Post-Service Insurance Benefits For Certain  
Elected Officials and Senior Management Employees**

Dear Mr. Smith:

This letter is a summary of our Opinion Letter to you on this subject of this date. That letter constitutes our official opinion. Legal reliance should be placed on the official opinion.

You have asked us to review, analyze, and draw conclusions about insurance benefits provided by the City to elected officials and certain senior management employees after they leave office or employment. You have also asked us to discuss whether those benefits may be modified or eliminated. Finally, you have asked us whether any individuals may become eligible for these benefits in the future.

Since at least 1986, the City has offered medical insurance benefits for life to former elected officials and to their dependents after the official's death, so long as the dependents remained eligible under the terms of the insurance plan. As early as 1993, the City paid the premiums for former elected officials who were elected to four terms; dependent coverage was available at the former official's expense on the same terms as offered to City employees. In 2006, purported individual insurance agreements were executed with several current and former elected officials. These agreements provided for medical insurance for the official with premiums paid by the City up to the cost of single coverage.

Since 1998, the City has provided insurance benefits for life at a discount to certain senior management employees upon termination of service according to a sliding scale of eligibility based on years of service and age at time of termination.

In 2008, the City Council adopted Resolution R2008-51. Pursuant to R2008-51, individuals who were elected to at least four terms as Mayor or City Council or a combination of those offices became eligible at the end of their service for "City paid single PPO health and dental insurance coverage or its equivalent ... ." Those individuals could purchase dependent coverage at no cost to the City. The Resolution eliminated these benefits for any individual who was not initially elected before October 1, 2008. The Resolution also eliminated discounted post-service benefits for senior management employees hired after October 1, 2008.

The individuals who were serving as Mayor and on the City Council when R2008-51 was approved were made eligible for more generous benefits. Any of those individuals who had been or later was elected to four terms would, at the end of their service, be eligible for City-paid health insurance up to the PPO family coverage level and City paid dental insurance up to the cost of indemnity family coverage. Additionally, these individuals could have their health insurance deductibles and coinsurance amounts "waived ... as agreed by the health insurance carrier." Finally, these individuals could "be reimbursed out-of-pocket expenses for health, dental and vision costs not covered by insurance." These benefits were enumerated under the heading of "Current Mayor and Council Benefits," but have continued to be offered to the former elected officials who were then serving, although not all have taken advantage of them. Two individuals who served at that time are currently serving, but had not at that time, or yet, been elected to four terms.

The City Council then adopted Resolutions R2009-57 and R2010-41. R2009-57 eliminated City-paid insurance for all current and future elected officials. R2010-41 granted certain benefits – which did not include the post-service benefits discussed here – and provided that the only benefits for current and future elected officials were those listed in R2010-41. (The Charter was amended in 2009 and included a provision that City-paid insurance could be provided to Council members only during their terms of service, but that Council members might be permitted to participate in City insurance after their service at their own expense. It also stated that it did "not affect" the post-service benefits discussed in this letter. As such, the amendment by its plain language had no effect on those benefits.)

There are numerous legal issues raised under these circumstances. The key concept, however, is how an individual may become legally entitled – "vested" – to the benefits and whether he or she has done so. City resolutions such as those discussed here can be sufficient to entitle individuals to benefits. First, the resolutions must be valid under the law. We are aware of no reason that these resolutions would not be valid. Second, if there are conditions attached to the entitlement, then those conditions must be met.

Under the most recent of the resolutions granting benefits – R2008-51 – the individuals had to meet two conditions. First, they had to win their first election to Council or Mayor before October 1, 2008. Second, they had to be elected to at least four terms. At that point, they were vested and, when they left office, they could collect the benefits. Anyone who met these conditions became vested in the benefits and had a legal right to keep them. Once a person has a vested right, a government may not take that right away except in extraordinary circumstances.

Jose Smith, Esquire  
April 2, 2015  
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If the government does take away a vested right outside those narrow circumstances, the individual may sue the government for violating his or her constitutional rights.

By the same token, however, a government may take away benefits that have not yet vested. Put simply, what a City gives by resolution, it may take away by resolution, if the benefit has not vested. This is what occurred when the City approved R2009-57 and R2010-41. It took away these benefits from anyone who had not become legally entitled to them – that is, the two individuals who were first elected before October 1, 2008, but had not yet been elected four times.

The same analysis applies to discounted benefits offered to senior management employees. Eligible employees hired before October 1, 1998, became vested in the benefits when they terminated their service. The benefits may not now be eliminated for them. Individuals currently holding eligible senior management positions and who were hired before October 1, 2008, may become vested when they terminate employment from those positions – unless the benefits are modified or eliminated before then. Senior management employees hired after October 1, 2008, are not eligible for the benefits.

In summary, there are a number of individuals who vested in these City-paid, lifetime insurance benefits (or in the senior management benefits) and, absent extraordinary circumstances that do not appear to be present here, those benefits may not be taken away. However, the Council did take lawful action to eliminate those benefits from the two individuals who could have vested – but had not – when it adopted R2009-57 and R2010-41. The City could do the same for currently employed senior management employees who were hired before October 1, 2008.

Please refer to our official opinion letter for a full factual and legal analysis.

Sincerely,

**BRYANT MILLER OLIVE P.A.**

A handwritten signature in black ink, appearing to read "David C. Miller", with a stylized, cursive script.

David C. Miller