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Date: July 20, 2016

To: Honorable Supervisors of the County Board

cc: County Clerk Joseph Czarnezki (c/o Janelle Jensen)
County Executive Chris Abele
County Comptroller Scott Manske
Deputy Corporation Counsel Paul Kuglitsch
Interested Parties

From: Interim Corporation Counsel Colleen Foley 
Assistant Corporation Counsel Jim Carroll

Re: Referral of File 16-69

At its June 23, 2016 meeting, your honorable body referred File 16-69 to the Office of Corporation Counsel pursuant to MCO 1.15. That ordinance allows a one-third minority of the County Board to refer a matter to Corporation Counsel for a “written opinion ... as to the legality of the resolution or ordinance offered, or the recommendation made in any report presented to the county board for adoption.” File 16-69 is as follows:

From the County Executive, requesting authorization to amend Sections 201.24(8.5) and (8.17) of the Milwaukee County Code of General Ordinances to provide a fiscal analysis before action by the Pension Board on any interpretation of Employees’ Retirement System (ERS), any decision on benefits in ERS, or any proposed modification of the rules of ERS.

The primary question for referral to Corporation Counsel is as follows: What is the County Board’s role in determining the fiduciary responsibilities of the pension plan? Put another way, is the County Board compliant with its fiduciary and legislative responsibilities in overseeing the pension plan? A brief history of the Milwaukee county pension system is useful in answering that essential question.

The Milwaukee County Pension Board – Background

Milwaukee County’s Employees’ Retirement System (ERS) began in 1938 and is codified in MCO Chapter 201. The governing ordinances were significantly revised in 1967. All employees who commenced County service on or after December 24, 1967 are subject to the “modern” version of the pension ordinances found in MCO 201.24.

MCO 201.24(8.1) provides that the Milwaukee County Pension Board is responsible for the “general administration and responsibility for the proper operation of the retirement system and for making effective the provisions of [the pension ordinances].” Pursuant to MCO 201.24(8.2), the Pension Board is comprised of 10 members: 3 appointed by the County Executive, 2

appointed by the County Board chair, 3 elected by employees, 1 appointed by the Deputy Sheriffs' Association, and 1 elected by retirees.

The Pension Board has three primary functions. The first is investing the assets of ERS. The second is overseeing the benefit payment process and administration of ERS, in compliance with Milwaukee County Ordinances and the Pension Board's Rules. (*See* MCO 201.24(8.17) – "The board shall have the power to construe and interpret the system, decide all questions of eligibility and determine the amount, manner and time of payment of any benefits and reasonable administrative expenses hereunder.") The third is recommending the amount of the annual contribution from Milwaukee County. (*See* MCO 201.24(3.1) – "County contributions.")

While the Milwaukee County Ordinances provide the Pension Board with relatively broad discretion in managing ERS' assets and administering the County's pension system, the Pension Board does not design or determine the benefits available to County employees/retirees, nor can it pass Ordinances. The Pension Board can and does pass Rules to assist it in managing and interpreting the pension fund consistently within the framework of Chapter 201.

The Milwaukee County Pension Study Commission – Background

The Milwaukee County Pension Study Commission is codified in Chapter 200 of the Milwaukee County Ordinances, which took effect in 1966. The Commission is tasked with studying and reporting to the County Board of Supervisors on all proposed changes to ERS. MCO 200.03. The County Board may not consider a proposed change to ERS until it has received and reviewed a report from the Pension Study Commission that discusses the actuarial effect of the proposed change, the cost implications of the proposed change, and the desirability of the proposed change. *Id.*

The Pension Study Commission consists of 5 members, all of whom are appointed by the Chair of the County Board of Supervisors. MCO 200.01(2). Three of the members are County Supervisors; the other two are community members who are neither elected officials nor County employees. *Id.* In December of 2002, MCO 200.01(2) was amended to indicate that at least one of the community members may not be an ERS member, related to an ERS member, or have any vested interest in the pension system.

The County Board's Role regarding ERS

As the legislative body for Milwaukee County, the Milwaukee County Board of Supervisors created ERS via ordinance in 1938 and has modified ERS' governing ordinances periodically thereafter. The County Board serves a fiduciary and legislative function for the pension system, with primary delegation of the fiduciary function to the independent body that is the Pension Board. Those trustees (members) have a fiduciary obligation to the pension fund. The fact that the County Board created the Pension Board does not eliminate that a particular County Board action may implicate its fiduciary obligations to the pension fund since Milwaukee County is the pension fund's sponsor.

The County Board's core and overriding fiduciary duty is to ensure that the pension plan is administered efficiently, prudently, transparently, and in the best interest of the participants. Common law provides guidance for basic fiduciary principles: a duty of loyalty and impartiality to act in the best interests of the fund and its participants and beneficiaries; and a duty of care or prudence to make reasonable inquiries, pursue available sources of information, and conduct due diligence as warranted.

Steve Huff is outside counsel for ERS and the Pension Board, with special expertise in pension matters. He opines that the County Board's role regarding the pension fund depends upon the particular action taken. For example, if the County Board authorizes and adopts an Ordinance that a portion of the pension fund be invested in a particular manner, such an action would implicate the County Board's fiduciary obligation to the pension fund. On the other hand, there are circumstances in which the County Board's role for the pension plan would be predominantly legislative. Attorney Huff stated that the distinction between fiduciary and legislative (Settlor) functions by a plan sponsor arise frequently in the ERISA context (which applies to defined benefit plans in the private sector), as well as regarding public pension funds like Milwaukee County's. In Attorney Huff's opinion, provision of a joint fiscal analysis implicates the County Board's legislative, not fiduciary function for the pension fund.

File 16-69

File 16-69 requests a policy change to strengthen safeguards within the County's pension system. Specifically, the file seeks amendment of sections 8.5 and 8.17 of MCO 201.24 to provide a fiscal analysis before action by the Pension Board on any interpretation of the system, any decision on system benefits, or any proposed modification of ERS rules. The proposed amendment would change the review process to require that the comptroller prepare a fiscal analysis, the budget director approve that analysis, and the actuary assist in/verify the analysis. That analysis must include: "a) the effect of the proposal on the county budget for the next 5 years and b) the effect of the proposal on the liabilities and assets of the funds of the system and required contributions to the funds of the system for the relevant future period."

On January 21, 2016, the Pension Board endorsed a policy of receiving a fiscal analysis before it takes action on subjects covered by the proposed ordinance. However, the Pension Board recommended that a fiscal analysis be directed by the actuary (versus directed by the comptroller), with review and assistance by the controller and budget director (versus approval by the budget director). *See* Secretary's Certificate dated January 21, 2016. Additionally, the Pension Board recommended that it impose timelines for receipt of a fiscal analysis (within 6 months of a request) or otherwise be authorized to proceed.

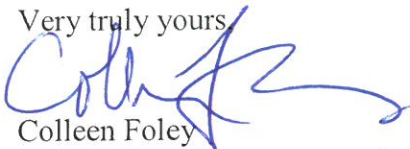
On January 28, 2016, Supervisor Michael Mayo, a member of the Pension Study Commission, submitted an amendment to items 8 of the Resolution, striking the budget director's role in the

fiscal analysis. He subsequently submitted an amendment to item 5 limiting the budget director's role to "review" instead of "approval" of the analysis.

The Pension Board and Study Commission's recommendations address concerns regarding executive power. More importantly, both bodies support File 16-69's fiscal analysis proposal as a useful tool, albeit with variations on implementation. Neither entity addressed whether the proposal's requirement concerning the "effect of the proposal on the county budget for the next 5 years" is distinct from the Pension Board's role for the pension plan.

The Pension Board and Pension Study Commission's endorsements provide the fiduciary oversight that the Board delegated to those bodies. The County Board's authorization and approval of File 16-69 would not directly trigger the Board's fiduciary responsibilities in this instance based upon the subject matter involved (additional safeguards to protect the plan). But ultimately, reliance upon a fiscal analysis before making pension plan-related legislative decisions demonstrates a higher degree of fiscal prudence by the County Board commensurate with its dual obligations.

Very truly yours,



Colleen Foley
Interim Corporation Counsel