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VIA E-MAIL

Raul J. Aguila, Esq., City Attorney
City of Miami Beach
1700 Convention Center Drive, 4th Floor
Miami Beach, FL 33139

Re: Proposed Underground Installation of Stormwater Pump in South Pointe Park

Dear Raul:

As you know, we represent the Portofino/South Pointe Master Association, Inc. and the Continuum on South Beach Master Association, Inc., which comprise the units at the Portofino Tower, South Pointe Towers and Continuum Buildings in South Beach. As we have indicated in the past, we are strongly opposed to the installation of a stormwater pump – whether installed above-ground or fully underground – at South Pointe Park (the “Park”).

The City Attorney and our law firm are in agreement that the installation of a stormwater pump *above-ground* in the Park would trigger a County-wide referendum under the County Charter’s “Save Our Parks” law (the “Parks Law”). In this letter, we address the legal issue of whether the installation of a stormwater pump *underground* at the Park would also trigger a County-wide referendum under the Parks Law. It is our understanding that the Public Works Department is now considering installing the pump underground in an attempt to fall under the Parks Law’s Section 7.02(L) (the “Exception”), which provides a narrow exception from the referendum requirement for certain underground installations.

Based on the analysis set forth below, it is clear to us that the installation of a stormwater pump *underground* at the Park would trigger a referendum under the Parks Law for at least two (2) reasons. First, the Exception is inapplicable on its face to the installation of a stormwater pump by the City underground at the Park. Second, even if the Exception were deemed to be generally applicable in this case, the installation of a stormwater pump underground would fail to meet the provision of the Exception which requires that the installation not affect the park, natural resources or similar items. (It is our understanding that the City Attorney agrees with us on the latter point and, thus, a determination of the applicability of the Exception is dependent on a full understanding of what is proposed to be installed underground and its environmental and other effects.)

I. Facial Inapplicability of Exception

The Parks Law generally requires the approval of the electorate in a County-wide referendum to the extent a local government desires to install improvements in a park. The Exception (Section 7.02(L) of the Parks Law) offers a narrow exception to this requirement and is set forth below.

Nothing in this Article shall prevent . . . the construction, operation, maintenance, and repair by government agencies or private operators of or issuance of temporary permits for the following, provided that there be no adverse impact to natural resources on lands acquired or designated for preservation by the Board of County Commissioners: . . .

L. Agreements with cable, internet, telephone, electric or similar service providers or utilities, so long as any installations are underground or do not adversely impact natural resources, or parks facilities and uses.

It is axiomatic under the law that the starting point for the analysis of any legislation is its plain meaning. (*See Seagrave v. State*, 802 So.2d 281, 286 (Fla. 2001) (“One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning...)). The plain meaning of the Exception indicates that it applies only to third party service providers pursuant to installation agreements with the local government. The explicit language of the Exception states that it applies to “[a]greements with cable, internet, telephone, electric or similar service providers or utilities.” Therefore, the clause provides a referendum exception for routine agreements between a city and AT&T, FP&L, Atlantic Broadband and similar providers. (For example, it would make no sense to require a County-wide referendum each time AT&T seeks to install an internet cable underground.)

On the other hand, the clause does not apply to a city that is seeking to install its own sewer or stormwater equipment in the park. Not only is there no third party involved in the latter case in order to require an installation “agreement” with a service provider, but the nature of the equipment to be installed with a stormwater pump differs markedly from what is contemplated in the Exception language. Significantly, none of the service providers mentioned in the Exception clause is in the business of installing equipment that has the potential for fluid discharge, chemical discharge or similar environmental effects on pristine parkland. Installing a narrow telephone cable underground is very different than installation of a major stormwater pump, which carries thousands of gallons of stormwater and potentially hazardous material.

The inapplicability of the Exception to the instant case is underscored by the fact that the Parks Law already addresses stormwater installations in another clause of the law, Section 7.02(A). See below Section 7.02(A) of the County Charter:

Nothing in this Article shall prevent . . . the construction, operation, maintenance, and repair by government agencies or private operators of or issuance of temporary permits for the following, provided that there be no adverse impact to natural resources on lands acquired or designated for preservation by the Board of County Commissioners:

A. Appropriate access roads, bridges, fences, lighting, flag poles, entrance features, picnic shelters, tables, grills, benches, *irrigation systems*, walls, *erosion control devices*, *utilities*, trash removal, parking and security and fire facilities *for the primary use of the park system*" (*emphasis added*).

All parks need drainage and similar infrastructure to avoid flooding at the park and to allow the park to function properly. Therefore, an exception exists in the Parks Law for "utilities" and "irrigation systems" that are needed for the "primary use of the park." However, there is no provision in the Parks Law that gives a city the right to install a massive stormwater pump that is needed to serve many blocks of the city and has nothing to do with the park.

It is another basic doctrine of statutory construction that laws should not be interpreted so as to make them redundant. There would be no reason for the above reference to utilities in Section 7.02(A) if the Exception in 7.02(L) allowed ALL underground installations of any type to be installed. In keeping with the overall intent of preserving park land, the Parks Law allows underground irrigation and similar installations by a city only if necessary to run the park. Meanwhile, the Exception in 7.02(L) allows routine telephone, cable and similar installations with third parties.

Finally, it is worth noting that Section 7.03 of the County Charter states that "[t]he provisions of ["Save Our Parks"] shall be liberally construed in favor of the preservation of all park lands, aquatic preserves, and preservation lands." In the event it is ambiguous as to whether a proposed installation in a park meets a referendum exception under the Parks Law, the ambiguity must be resolved by not allowing such installation. (We do not believe the clause is ambiguous but are merely pointing out that, if someone finds this clause to be ambiguous, the Parks Law explicitly provides that the clause should be construed to preserve the park and not allow construction or installation.)

II. Inapplicability of Exception as Applied to this Case

The Exception plainly states that underground installations are exempt only if they "do not adversely impact natural resources, or parks facilities and uses." As stated above, the City Attorney's office is in agreement with us that a determination as to whether the Exception applies cannot be made unless it is known what will be installed underground and an analysis is done to determine if the installation will adversely affect natural resources and the Park. Although we have yet to be told what would be installed underground, we are confident that an engineer would determine that a major stormwater pump would pose hazards to the park and the environment and natural resources. We have engaged an engineer to examine these issues and would be happy to schedule a conference with him to discuss these adverse impacts in more detail.

III. Conclusion

Based on the foregoing and our prior correspondence, it is clear that a County-wide referendum would be required to install a major stormwater pump above-ground or underground.

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City Attorney
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The Exception would not apply, either on its face or as applied to these facts.

If the Public Works Department decides to proceed to try to install a stormwater pump without a County-wide referendum, our clients are prepared to file a lawsuit in court and to seek a preliminary injunction while the matter is being litigated. Due to the need for testimony of many consultants, including environmental engineers, we expect such a lawsuit and its appeals to freeze any activity on a stormwater pump for at least three (3) years. In light of this, along with: (i) the partial deed restriction waiver that would be required for the Project to move forward (as discussed at length in my August 10, 2020, correspondence to you); (ii) the fact that there are other locations for a stormwater pump South of 5th, including areas in which the City already has easement rights; and (iii) the countless residents that have spoken to the Mayor and Commission against the Project, we strongly urge the City to drop the Park as a potential location for the installation of the stormwater pump whether above-ground or underground. Additionally, our clients are prepared to vigorously gather support to vote down such referendum, if ultimately pursued by the City.

After your review of the above, please advise us on the City's position regarding the inapplicability of the Exception. We are available to discuss this with you at any time and thank you for your consideration.

Sincerely,

Shutts & Bowen LLP

A handwritten signature in blue ink, appearing to read "Alexander I. Tachmes", with a stylized flourish at the end.

Alexander I. Tachmes, Esq.

cc: Alyson Herman, President, Portofino/South Pointe Master Association, Inc.
Keith Marks, President, Continuum on South Beach Master Association, Inc.
Alina Hudak, Assistant City Manager
Rafael Paz, Esq., Deputy City Attorney
Roy Coley, Public Works Director