ITEM 8A

To: The Honorable Mayor and Village Council

Date: October 3, 2013

From: Eve A. Boutsis, Village Attorney

Re: Village Attorney Update

A. Ordinances –

1. Staff was been directed to work on the "NPO" ordinance as it relates to "grandfathering." This matter was raised under "Other Business" during the April Council meeting. The matter had been raised, in various forms by Council Person Patrick Fiore, Council Person Tim Schaffer and Vice Mayor John DuBois. Staff is starting their analysis of this request. Staff has begun working on this request particularly as it relates to vested rights, nonconforming uses and application to Code, etc.

2. An ordinance relating to door-to-door solicitation of services or goods. The Village has an ordinance enacted in 2010, based upon a then county code provision prohibiting door to door residential solicitation of goods or services. In interim case law has precluded such an ordinance. The Village Attorney upon being notified of same proposes a new ordinance consistent with case law. The MDPD legal unit has reviewed the draft ordinance and has approved same as to form and substance. During first reading on July 8, 2013 the item passed without comment. Second reading held on September 9, 2013. Item was adopted.

3. Began review of variance procedures due to direction of Council, and at the sponsorship of CP Patrick Fiore - relating to hardship standard and other standards utilized relating to variances across the state. Working with P&Z staff on a comprehensive analysis of the variance issue.

4. Revised AIPP ordinance as to application to residential properties - to remove the application of fee to said residential improvements. Requested by Council Person Patrick Fiore. During first reading held on July 8, 2013, a substantial modification to the ordinance was made, which required the item to be rescheduled for a new first reading on September 9, 2013, to also exclude multifamily residential. The ordinance was revised back to an exclusion solely of single-family residential construction - not single family developments of two or more homes. Second reading scheduled for October 2013.

5. Drafted two ordinance based upon House Bill 50, which was passed by legislature. The bill creates a new provision in Chapter 286, Florida Statutes, that requires public comment be available on all items on an agenda- not necessarily at same time as item to be heard, but prior to action. The Village's procedure overall already provides this forum, except that the Consent Agenda should be moved to after public comments. Additionally public comments for boards and committees was also modified to allow public comments at the beginning of each agenda. A violation of this procedure, could result in attorney's fees, litigation, and costs to the plaintiff. First reading held on July 11, 2013. Enacted during second reading on September 9, 2013.

6. Began drafting Special Election and Ballot question per request of Council Person Fiore relating to changing election dates starting 2014, per a discussion item on June Council "Other Business" agenda item. This item failed during the September council meeting.

7. During a June council meeting the council discussed the E-1 zoning district as it relates to lot coverage. Due to direction of the Council staff prepared a memorandum relating to lot coverage within the E-1 zoning district. The memorandum was circulated to the council on September 9, 2013, as part of the Village Manager's report. First reading scheduled for October Council meeting. Sponsored by Council Person Tim Schaffer.

8. An ordinance relating to a Code of Conduct for all public meetings. This is an ordinance for future good governance and is modeled after South Miami and Doral's ordinance. Seeking direction from the Village Council whether to bring this item to a COW meeting.

9. Upon receipt of go-ahead, drafting regulations, within one-year moratorium period, relating to pre-annexation procedures.

10. An ordinance relating to special event process ordinance. Heard on first reading November 1, 2008. Item tabled at first reading. Further discussion had at November 19, 2008 COW meeting and direction provided to staff regarding same. No further direction provided.

11. In reviewing the enacted Land Development Code and Village's general code of Ordinances it has come to staff's attention that certain edits are required, including certain "scrivener's errors" type items, and certain edits staff recommends. For example, between 2002-2007 P&Z was known as "Community Development." All the code provisions dating prior to 2008 need to be modified to reflect Planning & Zoning Department and not Community Development. Additionally, any code provisions, outside of the LDC that reference a County zoning map designation needs to be modified to reflect the current Village zoning map designation. Staff is not planning to bring this item to a COW as it truly is a scrivener's error type ordinance, due to the 2.5 year review and adoption of the LDC. Staff anticipates bringing the item to the Village Council in December 2012. The Ordinance for first reading and cover memorandum has been prepared.

12. A resident requested a modification to the Village's Land Development Code. The Miami-Dade Board of County Commissioners has amended the Ordinance Relating to Zoning Regulations of Awnings, Canopies and Tents by amending Sections 33-64, 33-65, 33-69, 33-71 and 33-77; and deleting Sections 33-72 and 33-81 of the Code of Miami-Dade County. This amendment, among other things, changed the backyard setback requirement for awnings from twenty-five feet to ten feet. No action has been taken on the request to mirror the Village's Code to the modification requested to mirror the County Code. This item will be brought to a COW for direction.

13. Creation of ordinances relating to filming on private property. Sponsored by Mayor Shelley Stanczyk.

14. Modification of the Village's Noise Ordinance. Requested by Council Person Lindsay. Discussed during June COW meeting. Will be working with CP Lindsay on this item. Some modifications were made to noise ordinance as part of item 2, above, relating to NPO. Second reading of the revisions enacted during the November 2012 council meeting. Residential dBa modified to 60 (day time hours) and 55 (evening hours).

15. Staff has received Village Council authorization to draft an ordinance to create the process for implementing the citizen initiative relating to increase of student population at private schools. A draft has been reviewed by Planning and Zoning and the Clerk's office. The draft is being distributed to the Miami-Dade County Elections Department, as the Elections Department shall have to coordinate with the Village on scheduling an election/ballot and the procedures for calculating the 2,000 foot radius from a private school, along with registered voters. A meeting was held with the MDC Elections Department. This item was discussed during the January COW meeting and staff will begin drafting and review to bring this item to the Council. Sponsored by Council Person Joan Lindsay. Staff will bring this forward to a future COW and is anticipated to be presented at an upcoming Council meeting.

16. An ordinance amending section 2-49 of the Village's Code of Ordinances, relating to Village Council meeting procedures - requiring the silencing of all electronic devices during council meetings by audience, staff, and council; and providing for the Police Commander to act as "Sergeant at Arms". Discussed during the July 2011 COW. This item has not proceeded to a First Reading. Awaiting further direction from the Council. [Sponsored by Mayor Shelley Stanczyk].

17. An ordinance relating to RLUIPA review procedures to require an administrative review process of any allegation of violation of RLUIPA, through a quasi-judicial hearing process, prior to file of a lawsuit relating to same. Proposed for a future first reading.

18. An ordinance relating to procurement - providing clarification of certain procurement procedures relating to State Statutes on competitive negotiation. Proposed by Building Department. Not scheduled for a council meeting at this time.

19. An ordinance relating to business licensing; making the provisions of chapter 6 relating to licensure; to comply with chapter 205, Florida Statutes; providing state exemption for real estate brokers; broker and sales associates. To be brought to a COW for discussion. Staff request revisions to the enacted code relating to business licensing to provide additional clarity to the chapter.

20. Section 10.1 of the Charter entitled "Neighborhood Protection" requires the development of an implementing ordinance. Staff waiting for direction to proceed in developing same.

B. Contracts and Pending Items

1. Attention to pending county ordinances that may affect the Village with a county-wide application.

2. Attention to Fire Station - Communications with Mr. Carlos Heredia of MDC Fire Department; attended meeting with Mr. Scott Silver and P&Z Department; attention to application for zoning hearing - this matter will involve a Comprehensive Plan Amendment to the Future Land Use Designation for the proposed fire station at the Palmetto Bay Village Center. Please keep track of any communications with the applicants or community for disclosure at the upcoming hearing. The applicant shall soon be filing an application for zoning, public hearing, quasi-judicial proceeding.

3. Attention to various public records requests.

4. Discussions with Mr. Jerry Proctor counsel for the Alexander Montessori School - regarding possible election to increase student population, consistent with Charter. Mr. Proctor has requested that the resolution authorizing the special election be placed on the May council agenda. Mr. Proctor has reviewed the proposed ballot language. The application for increase in student population and site plan modification was filed on March 20, 2013. The Village Council approved the special election resolution. Mr. Proctor, although proceeding with the Village's procedures, as outlined in the Village Charter, has put the Village on notice of a "reservation of rights" due to a recent Attorney General Opinion. The Attorney General issued an opinion, AGO 2012-32, to Clay County stating that the county should not adopt an ordinance containing other landowner consent to rezoning applications. This opinion does not address the power of referendum, the power of the charter, and the opinions relating to referenda, as protected by the State Constitution. An important distinguishing factor between the ordinance the AG reviewed and the charter - is the simple fact that the AG was reviewing a legislative action of "rezoning", via an ordinance. There have been cases in Florida that support citizen vote due to referendum action. The concept of referenda is found in the Fla. Constitution- Article I, Section 1 "All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." Article VI, Section 5 of the Constitution specifically references referenda, as provided by law. The Courts have held that a referendum is a basic instrument of democratic government, does not, in itself, violate the due process clause of the 14th Amendment when applied to a rezoning ordinance. The special election was held on June 25, 2013. Alexander School did not obtain the needed 75% voter approval as required by the Charter Provision, Section 10.1. 78 votes were for the student expansion (66.10 percent) and 40 votes against (33.90 percent). The special election question failed. Mr. Proctor, counsel for the school is on vacation and shall return to the office the first week of July. Discussions will be had with Mr. Proctor as to whether a legal challenge will be made as to the charter provision. A community meeting as provided under code was held on August 29, 2013, by the school, at the school property. The item will be scheduled for an up-coming zoning public hearing.

5. Discussions with Mr. Simon Ferro counsel for South Motors BMW regarding possible zoning application and process regarding same. Meetings with Mr. Ferro and Staff

regarding upcoming zoning public hearing, drafting of staff report, analysis of covenants, analysis of requests, and possible dedication of land. Worked on easement agreement with Mr. Ferro. First reading of Comprehensive Plan Amendment, FLUM designation ordinance and rezoning ordinance held during September. Approximately, in November, second reading on the ordinances shall be held, as well as the site plan modification hearing, and hearing to request the release of an existing covenant. These items are all considered quasi-judicial. Please comply with Jennings.

6. Finalized KLA and Westminster resolutions, covenants in lieu of unity of title and declarations of restrictions. The Westminster resolution has been recorded. The KLA resolution is in the process of recording.

7. Negotiated draft settlement of Shores at Palmetto Bay, LLC v. Palmetto Bay. Special Council meeting held on May 20, 2013. Settlement approved during that meeting and settlement executed at that time. Working with staff on bringing the revised site plan to hearing. Litigation stayed through the end of August, 2013. The parties have prepared a joint request for an additional stay, for an additional 90 days.

9. Began drafting "Class" appeal request to EQCB relating to Basin C waste water and drinking water extension. Letter issued to "Class" to determine if the individual members desire to "opt in" or "out" of the Class. Resident responses due one month after issuance of Village letter, on July 22, 2013. County Commissioner Bell's Chief of Staff Eddie Borrego advises that the County Resolution of support shall be presented to the Committee on July 9th and move to the full Commission on September 4, 2013. Of course this schedule is not guaranteed, but is anticipated. If not, there is no Commission meeting the month of August and the item would then be placed on a September agenda. Once County acts and community responses whether they would like to "opt in" to the Class, the appeal request will be filed by the Village. 33 property owners are interested in participating in the class. Staff anticipates filing the appeal to be heard in November, 2013. Staff is currently working on preparing expert testimony.

10. Assisted P&Z in drafting variance memorandum and memorandum relating to "grandfathering", nonconforming uses, and vested rights, per the direction of the Village Council.

11. Follow up on various public records requests. On July 11, 2013, the Council voted to release the appellate shade sessions relating to Palmer Trinity. As the shade sessions involved dual litigation (appeals and civil litigation) the transcripts were redacted relating to the civil litigation and released as of July 24, 2013.

12. **DIRECTION FROM VILLAGE COUNCIL.** On September 17, 2013, the Council issued a new vote on the release of shade transcripts. The Council moved that both the Palmer Trinity and Parkside/Charter School transcripts be released after settlement; positive disposition of the quasi-judicial site plan modification public hearing item; and successful termination of the 30 day appeal period. **I believe implicit in the motion is the understanding that if PT appeals or Parkside appeals, the shade transcripts would not be released - because the litigation that is pending would be on-going.** To be clear, neither settlement

precludes a third party from appealing. Should a third party appeal that would not preclude the release of the shade transcripts - as that would be new appellate litigation - based upon the final hearing. The appeal standard would be on due process, competent substantial evidence, and apply the correct law. The old litigation, would be completed, with the end of 30 day period on their ability to appeal, and a dismissal should issue based upon the settlement agreement. The Village Attorney asks the Council to clarify - on record - to ensure not just implicit, but fact, that motion intended what I describe herein.

13. Communications with the Florida Commission on Ethics, and the Miami-Dade County Commission on Ethics.

14. Attention to zoning authorization letter relating to 8950 SW 152nd Street.

15. Prepared memorandum with P&Z Staff as it relates to Variance standards, and cost of variances, per the direction of Council Person Patrick Fiore and Council Person Tim Schaffer, and as further directed by the Village Council during the June COW.

16. CIP/CIE ordinances will be re-heard during the October 2013 council meeting, as the Village did not open the items up to public comment. The items were public hearing items.

C. Special report.

1. Please continue to refrain from community contact on the Palmer Trinity matter as the Village is in litigation – two law suits – the 2008 original action, the 2010 declaratory action and the 2010 petition for certiorari. See below for further detail.

2. The Village Attorney is seeking dates to hold workshops on Ethics, Sunshine, and Robert's Rules of Order as applied to the Village. Please provide availability dates of the Council to the Village Clerk. The Village Attorney issued a memorandum on Roberts Rules in anticipation of the workshops. **The Village Attorney would like to schedule the Robert's Rules training during an upcoming COW meeting.**

3. Conducted research relating to charter enforcement related matters.

4. Drafted several park services contracts.

5. FPL, represented by Juan Mayol, of Holland & Knight, *may* file a petition for a replatting, Comprehensive Plan Amendment and a Re-zoning of the large parcel of land along Biscayne Bay, owned by FPL. FPL in interim, and in an abundance of caution has registered as lobbyists. At this point no application has been filed.

6. Communications with Mr. Joe Centorino and Mr. Larry Liebowitz of Miami-Dade County Commission on Ethics and Public Trust.

E. Litigation report. Each council person should avoid discussions with the Community about this possible project to ensure compliance with the Jennings Rule and due to attorney-client privilege. Please maintain all records relating to any communications from third persons on this property – record the time, date, location, subject matter. Please advise the community to refrain from contacting you. As this information is privileged, an update will be provided individually and/or at an appropriately designated attorney-client meeting.

1. Palmer Trinity v. Village of Palmetto Bay: The Applicant has filed two civil suits against the Village: the 2008 litigation seeks damages, while the 2010 litigation seeks to find our quasi-judicial ordinance unconstitutional. The 2010 case was consolidated with the 2008 case, for discovery purposes. The 2010 matter has been amended five times. A new judge has been appointed to the matter, Judge Norman Lindsay, as Judge Langer has retired. Judge Lindsay recused herself from the matter as she was part of the appellate panel reviewing the last Palmer Trinity petition for certiorari. Jeff Hochman of the Johnson Anselmo firm, hired by the Village's self-insurance fund, represents the Village in the 2008 litigation. As indicated the two civil actions incorporate by reference the appellate matters and claims that the appeals contribute to damages for the plaintiff. Mediation was held on June 3, 2013. An Attorney Client session was held on June 26, 2013. A hearing on the Village's motion to dismiss certain counts of the 5th Amended Complaint was heard on June 12, 2013 by Judge Beth Bloom. Certain counts were dismissed, remainder answered by the Village within 20 days of the hearing.

Please be advised that Insurance coverage by the Florida League of Cities ($5,000,000 policy) only covers liability as to certain claims - the federal claims alleged in the complaint. However, once one claim is acknowledged by the insurance, defense coverage is provided for all the claims. Should the covered claims be dismissed, the insurance defense as to the uncovered claims also goes away. The Council would be responsible for the litigation costs going forward as to those non-covered claims, as well as the liability costs associated with same. The Village does have liability protection as to state tort common law claims under 768.28, Florida Statutes, the "sovereign immunity" statute, provided liability limit of $100,000/$200,000 person/incident, unless a special bill is enacted by the State legislature for a greater amount. [The stat statute was subsequently changed to $200/$300,000, but the coverage should relate back to the prior version of the statute, with the lower cap for recovery].

On July 11, 2013, the Council voted to release the appellate shade sessions relating to Palmer Trinity. As the shade sessions involved dual litigation (appeals and civil litigation) the transcripts have been redacted relating to the civil litigation and were released.

On September 9, 2013, the Village Council voted to settle Palmer Trinity during a public forum. The Attorneys are to work on a development agreement and come back with a modified site plan for a quasi-judicial hearing. The settlement concept is for $200,000 in cash, $600,000 in permits, and release of most conditions in the underlying zoning resolution. Palmer Trinity is seeking a 50' instead of 75' buffer on the South property; ball field lights until 8:30 p.m., outdoor sound system until that time; and some other modifications. There will be a finalized development agreement memorializing the above terms, and then the quasi judicial hearing possibly authorizing the site plan modification.

3. Anctil v. Village of Palmetto Bay, Case no.: 11-14303 CA (02) (Fla. Cir. Ct). Plaintiff, parents of minor child, sued Village on May 11, 2011. Matter transferred to League for representation. Child allegedly hurt his arm during summer day camp. Any additional information beyond representation in complaint will be provided during any necessary shade sessions. Counsel for Anctil withdrew. No new counsel has placed a notice of appearance in the file. This matter may be dismissed.

4. Shores at Palmetto Bay LLC v. Village of Palmetto Bay. Appellate action (certiorari petition filed) after denial of application by the Village Council on December 12, 2012. The Court is to issue a scheduling order to hear the item. The applicant's request was denied due to an incomplete application amongst other things. Please refrain from speaking to anyone about this matter until after the appeal period expires. The Village filed its answer brief on February 27, 2012. The reply brief has been filed. Oral Argument held on February 13, 2013. The presiding Judges were Korvick, Hogan-Scola, and Cynnamon. Shores has filed a motion for a 60 day stay of proceedings. The Village did not object. The Village Attorney held a shade session on March 4, 2013, at 6:00 p.m. on this matter to discuss strategy and settlement. The matter has been stayed through the end of June (Second Extension). Settlement hearing held on May 20, 2013. P&Z hearing on the site plan, as may be revised, has yet to be scheduled. Applicant reviewing and revising the site plan. Stay of litigation granted until August 20, 2013. The Court granted the parties an additional stay for a 90 day period to complete the public hearing portion of the settlement agreement requirements.

5. Recall Palmetto Bay PAC v. Village of Palmetto Bay, Case no.: 12-33876 CA 02. Complaint served on Village on September 4, 2012. Emergency Hearing on temporary injunction and temporary restraining order held on same day. After hearing, an agreed order was entered dismissing 3 of the 4 counts of the complaint. Relating to advertising within Village events and print material by political action committee. No advertising allowed in Village event or publications. However, the site, Palmetto Bay Village Center, with consent of property owner, could provide a "booth" for Recall group, consistent with First Amendment law, including *Parkland Republican Club v. City of Parkland*, 268 F. Supp. 2d 1349 (S.D. Fla. 2003). Village filed a motion to dismiss on the remaining count on September 17, 2012.