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April 12, 2010

City Commissioners
Randy Knight, City Manager
City of Winter Park
401 Park Avenue, South
Winter Park, FL 32789

***via email & regular U.S. Mail***

Re: Commuter Rail

Dear Commissioners and Mr. Knight:

This letter contains my opinions regarding certain legal issues presented by the Interlocal Agreement between Winter Park and Orange County for commuter rail. I have not addressed all of the questions concerning the system, but I believe I have covered dispositive issues.

In summary, it is my opinion that the Interlocal imposes legal risk in several respects. These risks include ambiguity in the opt out language that purports to give the City a future right to withdraw from the contract if there is no dedicated funding source. And, if the City cannot effectively terminate under the contract, then it remains bound to a long term financing commitment that may exceed the authority granted by the Florida

Constitution and conferred by the voters at the election called as a result of and pursuant to Ordinances 2693-07, 2694-07, and 2698-07.

## SUMMARY OF PERTINENT LEGAL AUTHORITY

Article VII, Section 12, Florida Constitution (1968 revision) provides that a local government may not issue a certificate of indebtedness payable from its ad valorem tax base, maturing more than 12 months after issuance, unless the purpose of the indebtedness is "to finance or refinance capital projects authorized by law", and then, "only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation."

"Any instrument evidencing municipal indebtedness" for providing a "new project" may be subject to this provision and will require a vote of the citizens as provided for in the Constitution. *Neff v. City of Jacksonville*, 190 So. 468 (Fla. 1939) (Applying Article IX, Section 6 of the Constitution of 1885, which was the predecessor to the current provision found at Article VII, Section 12). (Emphasis supplied). The purpose of requiring an approval by a majority of the electors is:

> "... not to hamper ordinary powers of public authorities to enter into binding service or construction contracts for current governmental needs and requirements, but rather [is] to lay restraint on spendthrift tendencies of political subdivisions to load future boards with obligations to pay for things the present desires but cannot justly pay for as they go."

*City of Jacksonville v. Savannah Machinery and Foundry Co.*, 47 So. 2d 634 (Fla. 1950).

A long-term financial commitment may be authorized if there is a funding out or non-appropriation provision. *See*, for example, *State v. Brevard Co.*, 539 So. 2d 461 (Fla. 1989) (Approving a county's lease purchase arrangement for equipment, under which Brevard County established a non profit corporation to purchase the equipment for a lease back to the County. The cited provision of the Constitution that requires voter approval was not violated because the County reserved the right to terminate the lease without further obligation.) However, a court will scrutinize a non-appropriation provision and may determine that there are restrictions in the funding out clause that render it illusory, and thus this constitutional provision may be violated if the provision is found to be inadequate. *See*, for example, *Frankenmuth Mutual Ins. Co. v. Magaha*, 769 So. 2d 1012 (Fla. 2000) (In which the Court found that a non-substitution clause in a lease purchase agreement that prohibited a county from buying or renting substitute computer equipment if funds for lease payments were not appropriated and the lease was terminated, violated the constitutional requirement of voter approval for a "certificate of indebtedness" payable from the general ad valorem revenue. The Court found that the restriction on the ability to

procure substitute computer equipment "thus transformed the agreement into a long term certificate of indebtedness pledging ad valorem taxes.") Similarly, where a local government acquires property subject to a mortgage, the mortgage is a charge against the property and the government is placed in a position "of being coerced to meet annual requirements for interest and maturing principal under the mortgage, and there is a violation of the intent of constitutional inhibition against creating indebtedness without the consent of the freeholders." *Hollywood, Inc. v. Broward Co.*, 90 So. 2d 47 (Fla. 1956). *See also, State v. Florida State Improvement Commission*, 47 So. 2d 627 (Fla. 1950) (Voiding a county's agreement to lease an armory to be used by the National Guard for military purposes because of the long term financial obligation, notwithstanding the significant public purpose of the lease.)

Article VII, Section 10 of the Constitution prohibits a city from becoming a joint owner with, stockholder of, or to "lend or use its taxing power or credit to aid any corporation, association, partnership or person." It has been suggested that the City's participation constitutes a violation of this provision because CSX, a private corporation, derives substantial financial benefit from the overall commuter rail transaction.

It is my intent to focus here only on the legal issues that I view as more clear and dispositive. With regard to this provision, it is important to recognize that the courts have been reluctant to invalidate public undertakings unless the benefit to a private party is found to be the "paramount purpose of a project". *State v. JEA*, 789 So. 2d 268 (Fla. 2001). In a number of cases, public undertakings that benefit a private entity are approved because there is found a substantial or paramount public purpose that warrants the financial commitment, notwithstanding a substantial but incidental benefit to a private person or business. *See, e.g., State v. Osceola County*, 752 So. 2d 530 (Fla. 1999) (Bond obligation to finance and maintain a convention center served a public purpose even though the facility would be operated by a private business. The convention center promoted gainful employment, outside business interests, tourism, and provided a forum for educational, recreational and entertainment activities.); *State v. City of Miami*, 379 So. 2d 651 (Fla. 1980) (Approving public funds expended to construct and maintain a convention center garage, and the "benefits accruing to the developer from the facility as a result of related leases were not so substantial as to tarnish the public character."); *Poe v. Hillsborough Co.*, 695 So. 2d 672 (Fla. 1997) (Approving a bond issue to finance a football stadium to house the Tampa Bay Buccaneers, and finding a paramount public purpose, despite a clause in the stadium lease that gave the football team the first $2M in net revenues from non-football events.) There are other opinions that are similar, but from these authorities it seems to me that the issue of pledging credit or finance to aid a private business is not clear or dispositive.

## EXTENT OF THE VOTER AUTHORIZATION

Ordinance 2698-07 was in response to citizen initiative Ordinances 2693-07 and 2694-07. Pursuant to these Ordinances, a referendum election was held and the citizens approved two specific undertakings:

1. The City of Winter Park may authorize the use of land owned or controlled by the City for the construction, renovation or operation of a commuter rail station.

2. The City may appropriate or expend funds for purposes of "designing, permitting, constructing, renovating, maintaining, operating or supporting any structure or building **for use as a commuter rail station within the City**.

In my opinion, the election in 2007 thus gave the Commission the discretionary authority to enter a long term financial commitment of City funds only for purposes related to a commuter rail station "within the City". The Interlocal Agreement with Orange County calls for the City to cover a portion of the general operating and capital costs of the project, thus encumbering on a long term basis funds that were arguably not expressly authorized by the electors, in my opinion. There is, therefore, a risk that the financial commitment regarding general expenses could be determined to be in violation of Article VII, Section 12 because the Agreement is an obligation payable from the general revenue of the City, "maturing more than 12 months" after the City entered the obligation, without a vote of the electors.

If the City chooses to renegotiate or amend the interlocal agreement with Orange County, it would be lawful in my opinion for the Commission to agree to pay a portion of general operating or capital costs of the commuter rail system, so long as there is an unrestricted funding out or non-appropriation provision that would give the City complete discretion to non-appropriate funds for these purposes on an annual basis.[1] In any renegotiation, I recommend clarifying that in the event of a non-appropriation of funds, that the consequence would solely be, at the discretion of the County, that the station would no longer be used for commuter rail and there would be no commuter rail stop in Winter Park. I recommend that the agreement expressly provide that there would be no other financial sanction or consequence as a result of a non-appropriation of funds.

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[1] In my opinion, an agreement to give up a commuter rail stop in Winter Park in the event of a funding out or non-appropriation would not be a substantial limitation on the exercise of governmental discretion, as was the case in *Frankenmuth*, *supra*, in which the funding out clause restricted the government from purchasing or leasing computers from any other source for two years following the termination of the lease purchase agreement following a non-appropriation.

## SUMMARY OF PERTINENT CONTRACT PROVISIONS

### Funding Issues

Section 5.2 of the Interlocal with Orange County requires that the City will pay a portion of the general capital costs, operating costs and bond debt service. The City's share of capital costs are estimated in Exhibit C to the Interlocal. Capital costs are paid by the City to the County, by the method and within the time period specified in Section 5.3.

The City's share of general operating costs are set out in a formula in the master Interlocal Agreement. (As used in this context, the City is responsible for a share of the County's general costs). This element of cost is not paid by the City until the expiration of the 7 year FDOT funding period. These operational costs will be paid by the City directly to the governing board of the Commuter Rail Commission. This Commission will operate and eventually own the system, as set out in the master Interlocal Agreement. After payment of its share of operating costs, the City may serve written notice to the County requesting reimbursement, and upon such notice the County will reimburse 30% of the local operating support costs paid by Winter Park.

Fixed guideway bond debt service is also required to be paid by the City based upon the formula in the master Interlocal Agreement, and the City's obligation is tied to the traffic miles located within Winter Park's boundary. This debt is paid by the City directly to FDOT, and the obligation arises only upon expiration of the 7 year FDOT funding period. Upon payment, the County will reimburse 30% if the City serves written notice demanding reimbursement.

These contract provisions purport to bind the City to pay a portion of the County's obligation to fund system costs, in addition to costs incurred in constructing a commuter rail station in Winter Park and maintaining the same. This obligation will continue for the 99 year term of the Agreement provided in Section 6.1, unless the Agreement is sooner terminated.

Section 6.2 sets out the exclusive means by which the City may terminate the Agreement sooner than the expiration of the 99 year term provided in Section 6.1. The Agreement will automatically terminate if the master Interlocal Agreement is not executed by the parties before October 31, 2007. (By two amendments, the parties to the master agreement have extended closing until December 31, 2010). A second basis for termination is if the City does not receive federal or state funds in an amount sufficient to construct the station in Winter Park, so long as the City notifies the County of termination pursuant to this provision within 15 days of the County's notification to the City that the County's second major installment is due to the FDOT. A third basis for early termination is if the City fails to approve the location, design or revised estimated capital costs for the

station, so long as notice of termination pursuant to this provision is made no later "than 30 days following the end of 30% preliminary design." It is generally assumed and reported that these first three grounds for termination have occurred and were waived, so I have focused my attention on the remaining trigger for early termination.

This fourth opportunity to terminate the Agreement occurs within 60 days of the expiration of the 7 year FDOT funding period. Within this time period, the City may terminate the Agreement by giving 30 days notice to the County upon the occurrence of the following mandatory conditions:

> "A dedicated funding source to defray the local operating support costs and the fixed guideway bond debt service cost for the commuter rail system has not been secured; and the decision to terminate is made by a majority vote of the City Commission." (Emphasis supplied).

In my opinion, this language provides that a dedicated funding source need not cover 100% of the operating costs or bond debt service cost. Nor must the dedicated funding source exist throughout the 99 year term of the Agreement. My opinion that the funding source need not exist during the entire term of the Agreement is supported by language in Section 5.3(d), because that provision states that the City is relieved from its financial obligation only "so long as such dedicated funding source exists." This language thus contemplates that the City's obligation will be resurrected if the dedicated funding source is removed (or expires) during the 99 year term. And, the fact that the dedicated funding source need not cover 100% of the City's obligation is manifest in the language in Section 6.2(d)(1), which provides that the source need only "defray" the City's financial obligation.

Assuming the first three grounds for early termination are no longer available to the City, the City is at risk that a temporary and partial dedicated funding source could exist when the FDOT funding period expires, and the City could arguably not have the right to terminate at that time for the reason that the dedicated funding source was neither permanent or complete. Moreover, once the "window" closes, at any point in the future the funding source could be removed, and the City's obligation to fund a proportionate share of the County's share of general system expenses would, under the terms of the contract, be imposed.

Because of the constitutional issue in Article VII, a 99 year financial commitment under these circumstances raises legal concerns in my opinion. I recommend that a funding out clause be included in any amendment to the contract or replacement contract. It is typical in government contracting where a long term indebtedness is not expressly approved in a referendum election, that the governing authority will annually have the discretion to determine that there are insufficient funds available for appropriation to satisfy

an annual indebtedness. Thus, the City should reserve, in my opinion, the right to fund out of the obligation on an annual basis. If the City exercises that right, the Interlocal Agreement would be canceled and the Commuter Rail Commission would have the right to eliminate the stop in Winter Park.

## City's Right to Terminate or Amend

An opportunity to amend this Agreement is presented for several reasons, including the legal issues discussed above, and the fact that the Interlocal Agreement with Orange County incorporates as an exhibit only a draft of the master Interlocal. In Section 6.4, the parties acknowledge the significance of the master Interlocal Agreement and the Agreement provides "but for the master Interlocal Agreement, the County would not have entered into this Agreement with the City." (The City does agree in Section 6.4(c) that in fulfilling its responsibilities under the Agreement "it shall not undertake any action or engage in any act that is inconsistent with or conflicts with any of the terms and conditions of the master Interlocal Agreement." However, in my opinion that clause should not bind a future Board, particularly given the legal issues discussed in this correspondence.)

Mutuality of obligation and a mutual agreement concerning the essential terms and conditions has arguably failed, given the two 1 year extensions for closing, changes in the law, and changes in the master Interlocal. The parties entered the Interlocal based upon a draft, and that document has now changed and will possibly change again. Therefore, there is arguably no present meeting of the minds as between Orange County and the City because of changes in the master Interlocal Agreement, the two 1 year extensions of the closing deadline, and the changes in the law adopted in the 2009 special session.

Section 6.9 is a covenant to defend, by which the City and County both agreed that neither of them would challenge the Agreement or any portion of it. Section 6.10 provides for conflict resolution through the process of mediation set out in Chapter 164, Florida Statutes, prior to any court challenge. However, a constitutional infirmity would render the contract *ultra vires*, and a future Commission could vote to terminate it in my opinion.

## Liability

The Agreement does not provide expressly that the City will hold harmless and indemnify any party. Article VII of the contract provides that the City does not waive its sovereign immunity. Thus, there is no express undertaking by the City to indemnify a member of the Commuter Rail Commission, nor is the City expressly obligated to cover any cost of defense or pay any claim or satisfy any liability arising from the operation of the commuter rail system, including any occurrence within the jurisdiction of Winter Park. However, there may be an indirect obligation to answer for liability arising out of the operation. The indirect obligation may be imposed on the City through the cost funding formula, and allocation to the City pursuant to that formula. The CRT Interlocal Funding

Agreement between the Commission and FDOT defines "total operating costs" to include "all expenses incurred in connection with ... the direct cost to insure and provide risk management for the Commuter Rail System ... and any other cost directly related to the Commuter Rail System." (Emphasis supplied.) Under this broad definition, any allocation of responsibility to fund the system's operating costs may necessarily obligate the City to pay its proportionate share under the formula. And these costs may arguably include the payment of claims that may arise as a result of accidents. In the December, 2009 Special Session, the Florida Legislature specifically waived the limitations of liability under Section 768.28, Florida Statutes, for this project, and adopted a broad waiver of sovereign immunity with respect to settlement of claims that arise as a result of commuter rail accidents. *See,* Section 341.302, Florida Statutes as amended by Chapter 2009-271, Laws of Florida.[2]

Section 7 of Chapter 2009-271 also provides that the "Department of Transportation may complete an escrowed closing on the pending Central Florida Rail Corridor acquisition; however, the drawdown of such escrowed closing funds shall not occur unless and until final Federal Transit Administration full-funding grant agreement approval is obtained for the proposed Central Florida Commuter Rail Transit Project Initial Operating Segment.

In summary, although the statute does not expressly waive sovereign immunity as it relates to the City of Winter Park, there is a risk that the Commission, FDOT or Orange County could seek contractual indemnification from the City of Winter Park as a result of the existing language in the Interlocal Agreement that calls for the City to pay its proportionate share of the County's share of operating costs.

## RECOMMENDATIONS FOR FUTURE ACTION

In my opinion, the City of Winter Park has the legal right, if it chooses by action of the Commission, to terminate the existing agreement. The Commission also has the discretion to amend or renegotiate the interlocal. The referendum election held pursuant to Ordinance 2698-07 states that the City of Winter Park may authorize the use of land for a station in Winter Park and may expend funds related to constructing, maintaining and operating a building for the use as a commuter rail station within the City. The ballot language does not mandate this, but grants discretionary authority.

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[2] The statute provides that sovereign immunity is not generally waived. However, at subsection 17, the law states that the Department of Transportation may assume complete responsibility to "forever protect, defend, indemnify, and hold harmless the freight rail operator, or its successors, from whom the Department has acquired a real property interest in the rail corridor ... from and against any liability ... regardless of whether the loss ... is caused in whole or in part, ... by the fault, failure, negligence, misconduct, nonfeasance or misfeasance of such freight rail operator, its successors, or its officers, agents, and employees ...". (Emphasis supplied).

If the Commission chooses to terminate the existing Agreement with Orange County, or directs staff to attempt a renegotiated agreement or an amendment, the following provisions should be included and/or clarified in my opinion:

1. The City of Winter Park will not waive its sovereign immunity or the limits of liability by contract or general indemnity, and will not be responsible in excess of the limits in Section 768.28, Florida Statutes, for any portion of liability arising out of an accident.[3]

2. The City's responsibility is to expend funds only for the construction, remodeling, operation and maintenance of the commuter rail station in Winter Park, in accordance with the language in the referendum ballot. However, if the current Commission is willing to fund general operation costs similar to that in the current version of the Agreement, then that portion of the Agreement should be subject to two express conditions as follows:

a. Claims, legal expenses, damages, liability and risk management costs and settlements will not be part of the cost allocation formula. Moreover, for any third party claim the City of Winter Park will not pay more than the limits of its liability under Section 768.28, Florida Statutes, with respect to any accident or liability claim.

b. The obligation to fund a proportionate share of operating costs and capital costs, will be subject to an unrestricted annual non-appropriation provision. In the event a future Commission determines that it will not appropriate funds to cover the share of expense, then the City of Winter Park will be relieved of the obligation to pay any portion of general operating or capital costs associated with the system, outside of the station in Winter Park. The only remedy of the Commission, FDOT and Orange County in the event of a non-appropriation, will be, that at their option, the train station in Winter Park will not be used for commuter rail and there will be no stop in Winter Park. However, it should be expressly provided that the train station may be used for other purposes and that there will be no financial penalty or refund of any funds (including the refund of any federal grant funding) as a result of the non-appropriation and funding out.[4]

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[3] The current limits of liability are $100,000.00 per claimant and $200,000.00 per occurrence, although there is pending legislation that would increase these limits to $200,000.00/$300,000.00.

[4] If the City funded out but the Commission wanted to keep a stop in Winter Park, it would probably be necessary at that point for the parties to renegotiate a new agreement providing for maintenance and operation of the stop in Winter Park, and expressly delineating sources of revenue and apportionment

Undoubtedly, there will be other questions that Commissioners and staff will have. I am available to work through additional questions as needed, but this opinion should address the most urgent and dispositive issues that are presented by the City's participation in commuter rail under the current contract.

Please contact me if you have any questions concerning this.

Sincerely,

Usher L. Brown

ULB:tla

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of revenue and costs associated with the stop. At that point, clearly excluded would be any continuing obligation for the City to fund general operating or capital costs of the system by paying a proportionate share of Orange County's share of such costs.