MEMORANDUM

CITY OF WINTER PARK

TO: Mayor and Commissioners

FROM: James E. "Trippe" Cheek, III, City Attorney

CC: Randy B. Knight, City Manager

DATE: Friday, September 19, 2008

SUBJECT: Review of questions asked regarding the Revised Interlocal Agreement between the City of Winter Park and Orange County regarding the Central Florida Commuter Rail Transit System (August 27, 2007)

I have been asked to review certain questions regarding the Revised Interlocal Agreement between the City of Winter Park and Orange County regarding the Central Florida Commuter Rail Transit System (dated August 27, 2007)(hereinafter, "Winter Park ILA") that arose during and after Commissioner Dillaha's presentation at the City Commission meeting of September 8, 2008. This memorandum is intended to address those questions.

I. Overview

The **Winter Park ILA** was approved by the City Commission on August 27, 2007. It had been approved in form by the Orange County Board of County Commissioners on July 19, 2007. Under Article 8, the Winter Park ILA incorporates by reference the "Master Interlocal Agreement," ("MIA") which is actually three separate agreements, (i) the **Interlocal Funding Agreement** for the Acquisition and Construction of the Central Florida Commuter Rail System, to which Orlando, Orange County, Osceola County, Seminole County, Volusia County, and the Florida Department of Transportation are parties; (ii) the **Interlocal Governance Agreement** for the Creation of the Central Florida Commuter Rail Commission, with the same parties; and (iii) the **Interlocal Operating Agreement** for the Operation of the Central Florida Commuter Rail System, to which FDOT and the Central Florida Commuter Rail Commission are parties.

Under § 5.2(a) of the Winter Park ILA, Winter Park "is obligated and bound hereunder to timely pay to the [Orange] County all of the Capital Costs related to the development of the Winter

Park Station." Beginning with the conclusion of the "FDOT funding period,"[1] § 5.2(b) of the Winter Park ILA requires the City to pay costs of **Local Operating Support Costs** for the Central Florida Commuter Rail Transit System ("CFCRT"), in a proportion allocated to it by a formula in the MIA. In addition, at the conclusion of the FDOT funding period, the City under § 5.2(c) of the Winter Park ILA is required to pay to FDOT an amount for **Fixed Guideway Bond Debt Service costs**, in a proportion based on the miles of CFCRT track in the City. Orange County has agreed to reimburse the City for 30% of the Local Operating Support Costs and for 30% of the Fixed Guideway Bond Debt Service costs. See § 5.3(b) and (c).

Under § 6.2(d) of the Winter Park ILA, the City can "opt out" of the Winter Park ILA within sixty days of the expiration of the FDOT funding period if "a dedicated funding source to defray the Local Operating Support Costs and the Fixed Guideway Bond Debt Service costs has not been secured." Upon opt-out, the City is to close the Station and the CFCRT is to cease providing services to the Station. The City's obligations to pay Local Operating Support Costs and the Fixed Guideway Bond Debt Service costs will cease. The City is required to "indemnify and hold harmless the County from any obligation to refund, reimburse or repay, pursuant to their terms, any Federal or State funds and/or grants that were used to construct or permit the Station or parking areas constructed to serve the Station within the City."

II. Questions about the Winter Park ILA

I would summarize the questions asked in the recent Commission meeting as "whether the Winter Park ILA is inconsistent with Article VII, Section 12 of the Florida Constitution." The kernel of this issue is whether the Winter Park ILA is as a matter of law an agreement by the City which issues "bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance" so as to require a "vote of the electors." I do not believe a Court would find the Winter Park ILA to be inconsistent with this constitutional provision.

On its face, the Winter Park ILA does not issue bonds or agree to issue bonds. Instead, as I understand the questions, they are (i) whether the long term (99 years) of the Winter Park ILA requires a referendum, or (ii) whether the fact that the City is obligated to pay money to FDOT so that FDOT can repay an anticipated bond obligation it will have requires a referendum, or (iii) whether the *Strand* opinion from the Florida Supreme Court invalidates the Winter Park ILA.

Before addressing these specific questions, I believe it is important to note several important aspects of the Winter Park ILA. As noted above, the agreement itself does not pledge any City revenues to make payments of either the Local Operating Support Costs or the Fixed Guideway Bond Debt Service costs. Accordingly, it does not appear to me that the Winter Park ILA in and of

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[1]This is generally referred to as being the year 2017, but that is not technically correct. The FDOT funding period expires seven years from the commencement of revenue-generating operations of the commuter rail system; this will occur in 2017 only if that commencement is in 2010.

itself is a "bond" obligation on its face. I also note that there is no general prohibition in the law against cities entering into contracts which exceed twelve months in duration. A municipality may enter into contracts which exceed the term of the then-sitting governing board. See AGO 90-54 and § 166.021(4), *Florida Statutes*.

To review any concern that the City's agreement to essentially reimburse FDOT for its Fixed Guideway Bond Debt Service costs in the future is a "bond" by the City, I turned to the Interlocal Funding Agreement to review the mechanism for issuance of Fixed Guideway Bonds. Under § 4.03 of the Interlocal Funding Agreement, FDOT is to issue bonds pursuant to § 215.615, *Florida Statutes*. That section of the *Florida Statutes* states that "repayments made to [FDOT] under any interlocal agreement are not pledged to the repayment of bonds issued hereunder, and failure of the local governmental authority to make such payment shall not affect the obligation of the department to pay debt service on the bonds." Furthermore, bonds issued under § 215.615 can be validated under the statute and legal questions regarding the validity of the bonds can be resolved in that forum. My understanding is that these bonds are not expected to be issued until next summer.

The analysis in this situation has been clarified by the Florida Supreme Court's rescission of its original opinion in the case of *Strand v. Escambia County*. On September 18, 2008, the Florida Supreme Court receded from the approach it took in the initial *Strand* opinion and returned to the approach to tax-increment financing which had been the law since at least 1980. Accordingly, *Strand* as it now reads certainly would not invalidate the Winter Park ILA.

Article VII, Section 12 of the Florida Constitution provides that "municipalities...may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance, only to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation." I do not believe it likely that a court would find that the Winter Park ILA violates Article VII, Section 12, because the City retains the right to terminate the Interlocal Agreement by opting out.[2] As a result, the City has retained "full budgetary flexibility" to avoid pledging any ad valorem taxation powers or revenues. *See Frankenmuth Mutual Insurance Company v. Magaha*, 769 So. 2d 1012 (Fla. 2000) (acknowledging that when a city or county has the right to terminate the obligation, it would retain "full budgetary flexibility" and therefore not be subject to referendum under Article VII, Section 12); *see also State v. Brevard County*, 539 So. 2d 461 (Fla. 1989) (finding a long-term lease-purchase agreement which included an annual "renewal option" did not violate Article VII, Section 12, because the lease allowed the county to terminate the lease without further obligation in any given year and thereby maintain "full budgetary flexibility"); *State v. School Bd. of Sarasota County*, 561 So. 2d 549 (Fla. 1990).

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[2]Some have asked whether the language of the opt-out provision, because it uses the word "defray" instead of language such as "pay completely" or "pay in full," means that if there is a "dedicated funding source" that pays only a small portion of the expenses, the opt-out clause will not be available. Given the context of the agreement, I think it is highly unlikely that any court would construe the opt-out clause in that way. In addition, the word "defray" in every dictionary I have reviewed means "pay."

Even if the City did not retain the right to terminate the Interlocal Agreement, and the other discussions in this memorandum did not apply, the Winter Park ILA should not be found to violate Article VII, Section 12, unless the City had essentially obligated itself to rely on ad valorem taxation in order to make the payments in question. Some Florida courts have looked beyond the express language in the agreements creating indebtedness, and reviewed whether there is a violation of Article VII, Section 12 based on whether the city or county is either directly, indirectly, or contingently *bound* to pay their obligations from ad valorem revenues instead of other operational revenues or other governmental funds. *See Betz v. Jacksonville Transp. Authority*, 277 So. 2d 769 (Fla. 1973). The resolution of these cases is heavily dependent on the facts. However, the mere possibility of a decrease in revenues from a few sources of funding in the city is not sufficient to invoke the constitutional requirements for a referendum. *See City of Palatka v. State*, 440 So. 2d 1271 (Fla. 1983); *see also State v. City of Miami*, 7 So. 2d 146 (Fla. 1942) (finding a city does not violate Article VII, Section 12 "provided revenues which will be available annually are found to be sufficient to meet current expenses including amounts to become due under the contract for payment"); *DeSha v. City of Waldo*, 444 So. 2d 16 (Fla. 1984) (the "mere possibility that the City may some time in the future choose to expend general revenue to meet its bond obligations does not render the bonds 'payable from' ad valorem taxation").

The fact that a municipal obligation may have an incidental effect on ad valorem taxation does not subject the contract to the constitutional requirement of a referendum. *State v. Alachua County*, 335 So.2d 554 (Fla. 1976); *Town of Medley v. State*, 162 So.2d 257 (Fla. 1964). The Florida Supreme Court has held obligations to be promises to levy ad valorem taxes only when the record clearly reflects that *all* legally available non-ad valorem revenue sources have been pledged and the governmental body has agreed to do everything necessary to receive such revenue. *County of Volusia v. State*, 417 So.2d 968 (Fla. 1982).

The City has not pledged any specific revenue sources to pay the Local Operating Support Costs or the Fixed Guideway Bond Debt Service costs. The payment of those costs, at this time, would not seem to have more than an incidental effect on ad valorem taxation, based on the cost estimates I have seen. I further understood from recent Commission discussions that the currently anticipated revenue for FY 2017 is in excess of $63 million, with only $25 million of that from property tax revenues, leaving the City with approximately $38 million of unpledged revenues to spend that would be outside Article VII, Section 12.

Could someone bring a lawsuit to challenge the Winter Park ILA on grounds that it is in effect an indirect pledge of ad valorem tax revenues? That is possible, and the case would have to be taken seriously. The cases in this area of the law can be heavily dependent on facts. My reading of the case law is that where there is clearly no doubt under the scheme in question that ad valorem taxes have been pledged, even if that is not expressly stated, the scheme can be found invalid under the Florida constitution. In addition to the matters of legal interpretation discussed above, I do not believe that a challenge would succeed unless the challenger could prove that ad valorem tax revenues would the be only source of funding available to the City to make the payments called for by the Winter Park ILA. That does not seem to be the case here.

III. Termination clauses in the MIA agreements

Another issue raised in the most recent Commission meeting relates to § 6.02(B)(4) of the Interlocal Operating Agreement. As noted above, the Interlocal Operating Agreement is an agreement between FDOT and the Central Florida Commuter Rail Commission. The question raised involved two provisions indicating as a "Phase I contingency" that "this Interlocal Operating Agreement shall be terminated" if:

(a) FTA does not approve FDOT's entry into the final design process for Phase I prior to July 31, 2008; or

(b) Funding for the Commuter Rail System has not been included in the President's budget prior to July 31, 2008.

The presentation in the last Commission meeting questioned whether these dates had been met.

While FTA approvals and federal budget matters have not been within the realm of the City's normal information processes, both staff and the City Attorney's office have made inquiries of FDOT about the July 31, 2008 dates. FDOT's Rail Transit Project Manager, Tawny Olore, has indicated in writing that both deadlines were met. As to the first, Ms. Olore has indicated that "FTA Administrator James Simpson sent a 10-day notice to Congress on July 31, 2008 indicating that FDOT had fulfilled the requirements for entry into the final design process. This 10-day notice fulfills the requirement of Article VI, Section 6.02(4)(a)." As to the second, Ms. Olore has indicated that the CFCRT was included within the FTA's 2008 Annual Report on Funding Recommendations, as an appendix to the President's budget, and that this fulfills the requirements of § 6.02(4)(b). I am not completely sure as of this writing whether there is still a factual dispute about whether the July 31, 2008 deadlines were met, but it does appear that FDOT unequivocally states that the deadlines were met.

Would the City have any rights if the § 6.02(4)(a) and (b) deadlines were not met? It seems clear from Ms. Olore's written communications that FDOT will take the position that the City has no right to enforce the agreement or take the position that the agreement is terminated, because the City is not a party to the Interlocal Operating Agreement. I have also seen communications from Orange County taking this same position. The City's argument would most likely be that the Interlocal Operating Agreement is incorporated by reference in the Winter Park ILA. However, it may be difficult to tie these deadlines specifically to any provision of the Winter Park ILA.

Ultimately, there is a threshold factual question here which would need to be determined before further review.

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