

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - # 07-004

TO: Diane M. Gomez, Director, Department of Finance
FROM: Jorge L. Fernandez, City Attorney
DATE: April 4, 2007
RE: Release/Granting of Public Works Permits Prior to Payment

You have requested a legal opinion on the following question:

Whether the Departments of Finance and Public Works have the authority to (1) issue a permit to "large" customers for which payment has not yet been made and (2) refuse to issue future permits to these "large" customers for failure to pay on previous permits.

ANALYSIS

In response to your first question, the Finance and Public Works departments are prohibited from issuing permits prior to receipt of full payment, for the exclusive benefit of "large" customers.

It is the policy of the State of Florida that the state and its counties, **municipalities**, special districts or agencies shall not use its taxing power or its **credit** to aid any corporation, association, partnership or person. FLA. CONST. ART. VII § 10. [Emphasis added]. The term "credit" is defined in Nohrr v. Brevard County Educational Facilities Authority, 247 So. 2d 304 (1971), as follows:

The word "credit" as used in the constitutional prohibition of this section against pledging of state credit in aid of corporations or persons implies imposition of some new financial liability upon the

state or political subdivision which in effect results in creation of state or political subdivision debt for benefit of private enterprises.

The Departments of Finance and Public Works are clearly agencies of a municipality (here, the City of Miami), and the proposed policy of issuing permits to large customers with the intent of deferring payment until a later date imposes potential liability upon the City in the event that said customers fail to remit payment. Therefore, the proposed policy constitutes a pledge of credit, which is prohibited by law¹. Op.Atty.Gen 076-115 (1976) (advising that a local government's policy of deferring citizens' payment of ad valorem taxes up to 10 years after issuance of notes payable violated Article 7 § 10).

There is, however, a limited exception to the prohibitions set forth in Article VII § 10. Article VII § 10 allows a municipality to pledge its credit to corporations, associations, partnerships or persons undertaking projects and/or improvements that serve a paramount public purpose. Op.Atty.Gen. 058-258 (1958); Orange County Indus. Dev. Auth. v. State, 427 So. 2d 174 (1983); State v. Housing Finance Authority of Polk County, 376 So. 2d 1158 (1979); State v. Inter-American Center Authority, 84 So. 2d 9 (1955). Projects that serve a public purpose include improvement and restoration to public roads, management of water control systems, and construction and operation of electrical energy generating facilities. Northern Palm Beach County Water Control Dist. v. State, 604 So. 2d 440 (1992) (holding that on-site road improvements serve a public purpose where the road is publicly owned and the project is legislatively designated as one of public purpose); State v. Florida Municipal Power Agency, 428

¹ Apart from being prohibited by the Florida Constitution, the policy may also be prohibited pursuant to the Miami Code of Ordinances. Article 21 section 2111 of the City Code makes clear that "in establishing a schedule of fees and charges, it is intended that the City of Miami shall not be required to bear any part of the cost of applications or petitions under the ordinance," and that "no action of any type or kind under this zoning ordinance shall be taken on any application or petition until all fees and charges have been paid in full. Although the language addresses fees, applications and petitions concerning building and zoning permits, such prohibitions could arguably be applied to public works permits as well under the rationale of a general legislative intent to protect the city from unnecessary accumulation of debt.

So. 2d 1387 (1983) (holding that joint electric power supply projects, including the construction and operation of electrical energy generating facilities, fulfill a valid public purpose) and; Jacksonville Shipyards, Inc. v. Jacksonville Elec. Authority, 419 So. 2d 1092 (1982) (holding that city's agreement with electric authority and power company to finance construction of an electric generation plant did not violate the prohibition against pledging credit).

However, even if the Finance and Public Works departments are able to definitively characterize a project as one serving a valid public purpose, which would in turn validate the issuance of a public works permit prior to receiving payment, the departments' desire to limit this benefit solely to "large" customers poses serious equal protection problems. FLA. CONST. ART. I § 2. Citizens have a right to the expectation of uniformity where the levy of fees and taxes are concerned. Op. Atty.Gen. 076-115 (1976) (holding that proposed legislation which deferred payment of ad valorem taxes for certain Florida citizens and not others violated equal protection guarantees under the Florida Constitution). [Emphasis added].

In response to your second question, the Finance and Public Works Departments may withhold issuance of future permits for failure to remit payment for permits issued in the past, provided that the permit being sought by the applicant is not a building permit. The Finance and Public Works Departments may refuse to issue future permits to customers for failure to pay on previous permits based on a finding of nonresponsibility.² See Miami City Code of Ordinances, Chapter 18, Article III, sections 18-95 and 18-107. Although the section primarily addresses the

² Since this particular section of the Miami Code of Ordinances does not explicitly grant authority to withhold permits for failure to pay on previous permits, the Public Works and Finance Departments would necessarily be required to propose a resolution amending the City Charter to specifically provide the authority to do so.

City's right to assess bidder responsibility before awarding an RFP contract, it would not be unreasonable to apply its tenets to the issuance of a public works permit.

Section 18-95 states, in relevant part, as follows:

- a) Prior to contract award, the chief procurement officer or individual purchasing agent shall determine in writing that the bidder or offeror is responsible.
- (b) If a prospective contractual party who would otherwise have been awarded a contract is found nonresponsible, a copy of the determination and the reasons therefore shall be sent promptly to such party, which shall be given a reasonable opportunity for rebuttal prior to a final determination of nonresponsibility.
- (c) Factors to be considered in determining responsibility of prospective contractual parties shall include but not be limited to:
 - (1) Availability of appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, to meet all contractual requirements;
 - (2) A satisfactory record of performance;
 - (3) A satisfactory record of integrity;
 - (4) Qualified legal standing to contract with the city; and
 - (5) Compliance in supplying all requested information connected with the inquiry concerning responsibility.

Section 18-107 states, in relevant part, as follows:

(a) *Authority and requirement to debar and suspend.* After reasonable notice to an actual or prospective contractual party, and after reasonable opportunity for such party to be heard, the city manager, after consultation with the chief procurement officer and the city attorney, shall have the authority to debar a contractual party. . . . The city manager shall also have the authority to suspend a contractual party from consideration for award of city contracts if there is probable cause for debarment, pending the debarment determination. The authority to debar and suspend contractors shall be exercised in accordance with regulations which shall be issued by the chief procurement officer after approval by the city manager, the city attorney, and the city commission.

(b) *Causes for debarment or suspension.* Causes for debarment or suspension include the following:

- (1) Conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract or

subcontract, or incident to the performance of such contract or subcontract.

(2) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty.

(3) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.

(4) Violation of contract provisions, which is regarded by the chief procurement officer to be indicative of nonresponsibility. Such violation may include failure without good cause to perform in accordance with the terms and conditions of a contract or to perform within the time limits provided in a contract, provided that failure to perform caused by acts beyond the control of a party shall not be considered a basis for debarment or suspension.

(5) Debarment or suspension of the contractual party by any federal, state or other governmental entity.

(6) False certification pursuant to paragraph (c) below.

(7) Found in violation of a zoning ordinance or any other city ordinance or regulation and for which the violation remains noncompliant.

(8) Found in violation of a zoning ordinance or any other city ordinance or regulation and for which a civil penalty or fine is due and owing to the city.

(9) A contractual party who has defaulted under the terms of a contract with the city or any of its boards, agencies, trusts, authorities, councils or committees and has failed to cure such default.

(10) Any other cause judged by the city manager to be so serious and compelling as to affect the responsibility of the contractual party performing city contracts.

However, the Public Works and Finance Departments may be precluded from withholding issuance of future permits for failure to remit payment for previous permits, specifically where the permit being sought is a building permit.³ The granting or withholding of a building permit is not a matter of arbitrary discretion, and if the applicant complies with the applicable laws of the zoning code, then that applicant is entitled to a permit as a matter of right, regardless of the opinion or

³ Although such prohibitions deal specifically with building permits issued under the Zoning Code, the constitutional rights associated with such permits are, arguably, equally applicable to building permits issued by the Public Works Department.

action of the issuing officials. State v. Tampa, 48 So. 2d 78 (Fla. 1950) (holding that ordinance requiring that all places of assembly have space for off street parking as condition precedent to construction was substantially complied with, and denial of permit was unreasonable and arbitrary); Miami Beach v. Jonathon Corp., 238 So. 2d 516 (Fla. 3d DCA 1970) (holding where proposed plan had been approved and no question of zoning was involved, plaintiffs had clear legal right to issuance of building permit).

There may exist a constitutionally protectable property interest in a building permit where the applicant complies with and fulfills statutory/zoning requirements or where developer has justifiably relied on preliminary approvals.⁴ The intentional and arbitrary refusal to issue a building permit may subject the City to liability for damages sustained by the applicant as a result of a denial of the permit. Such action may be determined to be an impermissible "banking" of property. Decarion v. Monroe County, 853 F.Supp. 1415, 1418 (S.D. Fla. 1994) (holding property interest to building permit vests where the statutory prerequisites have been met and that the agency had no discretionary power to deny the permit"); Hy Kom Development Co. v. Manatee County, 837 F. Supp 1182 (M.D. Fla. 1993) (holding that property interest vests when builders have spent funds in reliance of building permits already issued, or in reliance of preliminary approvals even if a permit has not been issued). Hernando County v. Budget Inns, Inc., 555 So. 2d 1319 (Fla. 5th DCA 1990) (holding county's requirement that property owner show frontage road on its building plans as a precondition to issuance of a building permit, where no present need for road existed and without any showing that there would be a need in reasonably immediate future, constituted an impermissible attempt to "bank" property owner's land without compensation).

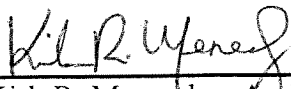
⁴ Whether individuals have a vested property right in a building permit is not well-settled under Florida law.

CONCLUSION

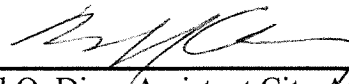
In conclusion, the Finance and Public Works departments are prohibited from issuing permits prior to receipt of full payment, for the exclusive benefit of "large" customers, under Article VII, section 10 of the Florida Constitution (based on prohibition of issuing credit); Article I, section 2 of the Florida Constitution (based on equal protection violations) and; Article 21, section 2111 of the City Code (which specifically requires payment of fees in advance of issuance of building permits). However, such a policy may be extended universally to all customers provided that the projects to be undertaken serve a public purpose. Finally, the Finance and Public Works Departments may withhold issuance of future permits for failure to remit payment for permits issued in the past, provided that the permit being sought by the applicant is not a building permit. Of course, since the City Charter does not explicitly grant the authority to withhold permits for failure to remit payment on previous permits under § 18-95 and §18-107, the Public Works and Finance Departments would necessarily be required to propose a resolution amending the City Charter to specifically provide the authority to do so.

PREPARED BY:

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Enclosure(s)