

**CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM**

TO: Mayor and Members of the City Commission
FROM: Alejandro Vilarello, City Attorney
DATE: June 9, 2003
RE: *Bond Counsel Legal Opinion: Agreement between the City of Miami and One Miami for construction of a Public Riverwalk; Use of Bond Proceeds; MIA-03-00009*

I recently sought the opinion of Bond Counsel regarding the proposed agreement between the City of Miami and City National Bank of Florida, as Trustee under Land Trust No. 2401-1149-00 ("One Miami") for the construction of a public riverwalk on substantially the following inquiry:

MAY A PORTION OF THE PROCEEDS OF THE AD VALOREM TAX BONDS ISSUED PURSUANT TO ORDINANCE NO. 12137 (OCTOBER 11, 2001) AND RESOLUTION NO. 02-797 (JULY 9, 2002) BE USED TO FUND THE ACQUISITION AND CONSTRUCTION OF THE IMPROVEMENTS ON PRIVATE PROPERTY WITHIN A PERMANENT PUBLIC EASEMENT AREA UPON WHICH AN INTEGRAL PORTION OF THE MIAMI RIVERWALK COMPRISED OF SAID IMPROVEMENTS, IS TO BE LOCATED?

The City's Bond Counsel, for the subject issue, Squire Sanders & Dempsey L.L.P., rendered its opinion, of which a copy is attached hereto. Said opinion concluded that the bond proceeds could be used subject to certain findings by the city commission. The opinion has been reviewed by my Office and is hereby approved and adopted.

Attachments

C: Joe Arriola, City Manager
Linda Haskins, Chief Financial Officer
Priscilla Thompson, City Clerk
Squire Sanders & Dempsey L.L.P.

M E M O R A N D U M

To: Alejandro Vilarello, City Attorney
City of Miami, Florida

From: Albert A. del Castillo *Adell*
Lori Smith-Lalla *Lori Smith-Lalla*

Date: April 24, 2003

Re: Agreement between the City of Miami and One Miami for construction and maintenance of a Riverwalk

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CITY OF MIAMI

FACTS:

The City of Miami, Florida (the "City") is proposing to enter into an agreement with City National Bank of Florida, as Trustee under Land Trust No. 2401-1149-00 ("One Miami"), for the construction and maintenance of a riverwalk (the "Agreement"). Under the Agreement the City will agree to use a portion of the proceeds of its \$153,186,405.85 Limited Ad Valorem Tax Bonds, Series 2002 (Homeland Defense/Neighborhood Capital Improvement Projects) (the "Ad Valorem Tax Bonds") to fund the acquisition and construction of certain improvements comprised of, among other things, landscaping, lighting, walkways, plaza areas and seating (the "Improvements") within an area described in the Agreement as the Riverwalk (as defined below). The Improvements are to be constructed on property owned by One Miami in the area which is subject to an Easement Agreement dated January, 1983, as amended (the "Easement"). The Easement grants to the City a perpetual, non-exclusive easement, in part, for access by the general public within an area along the waterfront described in the Easement (the "Riverwalk").

Pursuant to Section 3 (mm)(ii) of the City Charter, City Ordinance No. 11000 and the City's Downtown Miami Master Plan, the City has previously determined that waterfront areas in downtown must be accessible to the general public. In furtherance of this objective, the City requires that all waterfront properties that are to be developed grant an easement to the City for general public access to waterfront areas. The Easement was required by the City as a condition to the development by One Miami of a residential/office project on the property described in the Agreement, which includes the Riverwalk.

The City issued the Ad Valorem Tax Bonds pursuant to Ordinance No. 12137 enacted on October 11, 2001 and Resolution No. 02-797 adopted on July 9, 2002 (collectively, the "Bond Ordinance"). The Bond Ordinance, among other things, sets forth a list of proposed projects to be acquired and constructed with the proceeds of the Ad Valorem Tax Bonds. Citywide waterfront improvements and greenways are among the projects authorized pursuant to the Bond Ordinance under the headings "Parks and Recreation" and "Quality of Life", respectively.

ISSUE PRESENTED:

May proceeds of the Ad Valorem Tax Bonds be used to fund the acquisition and construction of the Improvements within the area referred to as the Riverwalk as contemplated by the Agreement?

CONCLUSION:

Based on the following discussion, provided the Agreement requires the City to be the legal owner of the Improvements, that the Improvements are constructed within the Riverwalk area, that the Easement is perpetual and provides for access to the Improvements by the general public and the City Commission makes appropriate legislative determinations as outlined below, the City may lawfully use a portion of the proceeds of the Ad Valorem Tax Bonds for the acquisition and construction of the Improvements.

DISCUSSION:

In general, under Florida law, in order for a municipality to expend municipal funds, such expenditure must be for a public purpose. Article 7, Section 10, Florida Constitution. However, the Florida courts have stated that if a City or County has used either its taxing power or pledge of credit to support an issuance of bonds, the purpose for which the proceeds are used must serve a "paramount public purpose" and any benefits to a private party must be incidental. See Poe v Hillsborough County, 695 So.2d 672 (Fla 1997) and State of Florida v. Osceola County, 752 So.2d 530 (Fla. 1999). Such courts have found a paramount public purpose to exist when the benefits to private parties are determined to be incidental. See Poe, 695 So.2d at 675 and Osceola, 752 So.2d at 536. The Florida Supreme Court determined that if an undertaking is for a public purpose, the use of tax moneys for such purpose would not be invalidated by the fact that such project would be operated by a private entity. See State of Florida v. Osceola County, 752 So.2d at 539. In our case, the Ad Valorem Tax Bonds are limited ad valorem tax bonds and as such, are backed by the taxing power of the City. Therefore, the appropriate test to apply to the use of the bond proceeds of the Ad Valorem Tax Bonds is the "paramount public purpose" test. Although the Florida Courts have determined in general that the development of recreational facilities serves a valid public purpose, the circumstances relating to the proposed expenditure of the proceeds of the Ad Valorem Tax Bonds should be analyzed to determine whether there is any benefit to a private party and, if so, whether that benefit is incidental. See State v. Osceola, 752 So.2d at 530.

We have also researched whether the construction of the Improvements on private property would affect the determination of public purpose. The fact that the Improvements will be constructed on private property would not necessarily negate a finding of public purpose, since One Miami has granted to the City the Easement, provided such Easement is perpetual and provides access to the general public. The Attorney General's office has opined that a city may expend funds for the maintenance of a permanent easement through privately owned property that is used as parking lots, provided such easement grants the public the right to travel on such property and the city commission determines that the expenditure serves a public purpose. See AGO 98-81.

A determination of public purpose is a legislative function and must be made by the governing (legislative) body of the governmental entity. See AGO 90-37. In order to demonstrate that the acquisition and construction of the Improvements serve a paramount public purpose, the City should make legislative findings that the Improvements are recreational and promote the health, safety and welfare of the public. The City should also make a legislative determination that the construction of the Improvements within the area which is subject to a perpetual easement for the benefit of the general public would primarily benefit the general public and would be of only incidental benefit to a private party. These legislative determinations by the City would demonstrate that the Improvements serve a paramount public purpose. In addition, title to the Improvements should be held by the City. In the cases cited above, the governmental entity was the owner of the facilities and the private parties were the operator or lessee of the facilities.