CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - #07-014

TO: James H. Villacorta, Executive Director
SEOPW, Omni and Midtown Community Redevelopment Agencies

FROM: Jorge L. Fernandez, City Attorney

DATE: August 24, 2007

RE: Legal Opinion - Overtown CRA Church Renovations - Use of TIFF Funds

You have requested a legal opinion on the following question:

WHETHER THE COMMUNITY REDEVELOPMENT AGENCY ("CRA") MAY EXPEND TAX INCREMENT FUNDS ("TIF") TO REPAIR AND/OR RENOVATE CHURCHES LOCATED IN THE OVERTOWN CRA?

ANSWER

For the reasons set forth below, your question is answered in the affirmative.

A community redevelopment agency is a public agency created or designated pursuant to Chapter 163 of the Florida Statutes. The City of Miami Community Redevelopment Agencies ("CRA") are three separate agencies: Southeast Overtown/Parkwest ("SEOPW"), Omni and Midtown. Nonetheless, all three describe their mission as the following: To revitalize specifically designated areas within the CRA boundary through good planning and the implementation of sound infrastructure improvements, thus enabling the CRA to generate successful redevelopment projects, from both the private and public sector, thereby achieving the complete eradication of slums and blight from the targeted areas. The CRA is totally committed to the preservation and enhancement of property values, stimulating the creation of new job opportunities for residents and improving the quality of life of those who reside within the redevelopment neighborhoods. *See* www.ci.miami.fl.us/cra.

Worthy of note, the tax increment funds ("TIF") are the funds used by the CRA to finance or refinance any community redevelopment the CRA undertakes pursuant to the approved community redevelopment plan. The CRA generally derives the TIF proceeds pursuant to ad valorem taxes levied annually via a specified formula.

ANALYSIS

I. The Florida Constitution and State Funds

Florida is subject to Fla. Const. art 1, § 3, which states:

> Religious freedom -- There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

This provision, which is also known as the Florida "no-aid" provision, was originally enacted to prohibit the state from using its revenue to benefit religious schools. Recently a Florida court cautioned that its holding regarding the application of the Florida "no-aid" provision, with regard to government vouchers for private school education, should not in any way be read as a comment on the constitutionality of any other government program or activity which involves a religious or sectarian institution. *Bush v. Holmes*, 886 So. 2d 340, 362 (Fla. 1st DCA 2004).

In interpreting this constitutional provision and the question of whether public funds may be utilized in aid of religious, charitable, benevolent and civic or service organizations, the Florida Supreme Court has traditionally considered issues such as the legislative purpose, extent of the funding, and the public benefit involved in the granting and use of said revenue. *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983).

In *Gidman*, a municipal expenditure was challenged on the grounds that it violated section 7.87 of the Boca Raton City Charter, which was at least as restrictive, if not more restrictive, than article I, section 3 of the Florida Constitution concerning the expenditure of public funds. That section reads, "No city funds shall be expended in any manner whatsoever to accrue either directly or indirectly to the benefit of any religious, charitable, benevolent, civic or service organization." *Id.* at 1279. A municipal charter is the constitution of a city and effectively limits the legislative power of a city in the same manner the state constitution limits the power of the Legislature. *See Gontz v. Cooper City*, 228 So. 2d 913 (Fla. 4th DCA 1970). The Supreme Court, however, held that the City of Boca Raton's expenditure of public funds for a day care center run by a non-profit organization did not violate the charter provision. *Gidman*, 440 So. 2d at 1282. The court rejected the argument that the city charter provision was a total bar to spending city funds at the charitable institution and determined in that particular situation that no violation had occurred. Essentially, the court determined that the appropriate analysis must address who the real beneficiary is on a case-by-case basis rather than reading the constitutional language as a total prohibition.

The court further stated that it would be an unreasonable or ridiculous conclusion to read the charter provision as a total prohibition against the city contracting for these types of services. *Id.* at 1281. Similarly, in *Southside Estates Baptist Church v. Board of Trustees, School Tax District No. I, In and For Duval County*, 115 So. 2d 697 (Fla. 1989), the court rejected an all-or-nothing approach to interpreting these type of statutes as leading to an absurd result and determined that the court must look at the quantum of benefit received by the religious institution to determine whether the Florida Constitution has been violated. A case-by-case analysis avoids having to make a choice between unfettered discretion to spend public dollars at sectarian institutions and prohibiting any public dollars from ever being expended at a sectarian institution without weighing the public benefit against any substantial benefit to the institution. *Bush v. Holmes* at 374.

a. Legal Precedent

The legal precedent in Florida is to allow revenue, in one form or another, to organizations – including churches – where the benefits from those revenues accrue to the community and are not used for the purposes of furthering religion or other prohibited use, even if there is an incidental benefit to the receiving organization. *See Koerner v. Borck*, 100 So. 2d 398, 402 (Fla. 1958) (church was allowed to conduct its baptisms on public property; the Florida Supreme Court held that the benefit accrued to the people of the county rather than the church); *Johnson v. Presbyterian Homes of Synod of Fla., Inc.*, 239 So. 2d 256, 261 (Fla. 1970) and *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So. 2d 304, 307 (Fla. 1971) (Florida Supreme Court declared that any benefit received by religious denominations is merely incidental to the achievement of a public purpose and a state cannot pass a law to aid one religion or all religions but state action to promote the general welfare of society, apart from any religious considerations, is valid, even though religious interests may be indirectly benefited).

b. The Lemon Standard and the Establishment Clause

The standard used by the Florida courts to determine the legality of utilizing public funds to aid religious organizations is the same standard used by the Federal Courts. This standard is known as the Lemon standard. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In order to pass constitutional muster, a statute must:

1. Possess a secular legislative purpose,
2. Must not have as its primary effect advancing or inhibiting religion and
3. Must not give rise to excessive government entanglement with religion.

Wiccan Religious Coop. of Florida v. Zingale, 2005 FL S. Ct. Briefs 873 (Fla. 2005); *see also Hobby v. State,* 761 So. 2d 1234 (Fla. 2d DCA 2000) (Florida court using the Lemon standard); *Malicki v. Doe*, 814 So. 2d 347, 355 (Fla. 2002) (Florida Supreme Court using the Lemon standard).

The Court has specifically addressed aid, both direct and indirect, in the context of the Establishment Clause. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002): Whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services and whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is "no," the program should be struck down under the Establishment Clause.

The analysis above shows that the Florida Constitution is not more restrictive than the United States Constitution and that these types of cases are subject to the federal Establishment Clause Lemon standard. Under this standard, a CRA, in granting funds to the general community for the express purpose of improving the community as a whole, would not be violating the Florida Constitution, even where churches may also benefit from said funds. This is because:

1. Funds would be distributed with the secular purpose of improving the blighted communities within their respective districts,
2. The primary effect of the granting of funds is not to advance or inhibit religion but rather to improve the aesthetic visage of these blighted communities and
3. The granting of funds would not give rise to excessive government entanglement with religion as the CRA would only be dealing with these churches with regard to church property and/or facilities and not with these churches in their sectarian roles.

c. The Free Exercise Clause

Another factor weighing in the favor of the CRA granting funds to churches is the United States Free Exercise Clause.[1] A court cannot violate the United States Constitution by excluding religious organizations from participation in programs. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a city ordinance was not neutral and restricted religious practice, and therefore was an unconstitutional violation of free exercise).

The Establishment Clause, the Free Exercise Clause and the Equal Protection Clause of the United States Constitution[2] act in concert to prohibit state action that restricts, limits, or divests one's legal rights, duties or benefits based on his or her religion. *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994). The Free Exercise Clause requires neutrality and prohibits "[o]fficial action that targets religious conduct for distinctive treatment." *See Lukumi Babalu*, 508 U.S. at 534. The Equal Protection provision of the Fourteenth Amendment prohibits "an unlawful intent to discriminate against [individuals] for an invalid reason, such as their religion." *Altman v. Minn. Dept. of Corr.*, 251 F.3d 1199 (8th Cir. 2001) (quoting in part *Batra v. Bd. of Regents*, 79 F.3d 717, 721 (8th Cir. 1996)).

[1] U.S. Const. amend. I., *supra* note 3.
[2] "No state shall... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Together, the Free Exercise Clause and the Equal Protection Clause reinforce one another and prohibit state action that singles out religion for discriminatory treatment. Additionally, as per the Free Exercise Clause, sectarian organizations cannot be denied the right to financial aid, which is available by the CRA to the general community for the express purpose of improving the community as a whole.

CONCLUSION[3]

It is the consensus of both the Federal and State Judiciary that a sectarian organization should not be discriminated against when public funds are readily available to the community for a secular legislative purpose, not having as its primary effect advancing or inhibiting religion and not giving rise to excessive government entanglement with religion. Therefore, the granting of funds by the CRA to organizations - including churches - located within the Overtown district, for the overarching purpose of improving the community as a whole, should be properly allowed.

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[3] Worthy of note, the CRA via CRA Resolution: CRA-R-06-0032, September 25, 2006, provided funding in the amount of $104,490.00 to Greater Bethel A.M.E. Church, located in the Overtown district for roof repairs.