

**CITY OF MIAMI**  
**OFFICE OF THE CITY ATTORNEY**  
**LEGAL OPINION NO. 10-002**

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**TO:** Honorable Mayor and Members of the City Commission  
**FROM:** Julie O. Bru, City Attorney *msc*  
**DATE:** November 12, 2010  
**RE:** Miami-Dade County On Demand Transportation

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You have requested a legal opinion on the following question:

*Is a county wide referendum legally required for the City of Miami to use its portion of the Charter County Transportation System Surtax proceeds, previously approved by Miami-Dade County ("County") voters, to fund the operation and maintenance of on-demand transportation services for low and moderate income senior citizens as now allowed by state law?*

For the reasons set forth below, your question is answered in the negative. A county wide referendum election is not legally required but the County must approve such use. The applicable County Surtax Ordinance, or at minimum, its listing of the projects, can be amended to allow for the use. Such amendment does not require a referendum vote.

**RELEVANT FACTS AND AUTHORITIES**

The applicable state statute that provides for this discretionary sales surtax is §212.055(1), F.S. (2010), (as amended to date). It authorizes a Charter County to impose a sales surtax of up to one (1) percent for transportation systems. This statute requires a referendum to approve and provide for this sales surtax,<sup>1</sup> which occurred in Miami-Dade County in 2002. The Miami-Dade County Commission ("County Commission") then enacted a County Transit System Discretionary Sales Surtax Ordinance ("County Surtax Ordinance") which provided for a one half of one (1) percent Charter County Surtax as authorized.<sup>2</sup>

The expenditures that were authorized by the ordinance include a general statement:

*Surtax proceeds may only be expended for the transportation and transit purposes specified in Section 212.055(1)(d)1-3 Fla. Stat. (2001). §29-124(b), County Code.*

The County disburses, to municipalities in existence since November 5, 2002, twenty (20) percent of the proceeds of the one-half penny transit surtax charged by the County pursuant to an interlocal agreement between the County and the municipalities.

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<sup>1</sup> §212.055 (1)(a), F.S. provides in the pertinent portion, (1) CHARTER COUNTY AND REGIONAL TRANSPORTATION SYSTEM SURTAX. - (a) Each charter county that has adopted a charter. . . that is within or under an interlocal agreement with a regional transportation or transit authority created under chapter 343 or chapter 349 may levy a discretionary sales surtax, subject to approval by a majority vote of the electorate of the county or by a charter amendment approved by a majority vote of the electorate of the county.

<sup>2</sup> §29-121 to §29-124, Miami-Dade County Code.

The County Surtax Ordinance includes a list of projects in one of its subsections and also includes a procedure to change the list.<sup>3</sup>

The County and the City both supported a request to change the applicable state statute, §212.055, *F.S.* to provide for on-demand transportation to be a permissible expenditure for the City of Miami to use a portion of its funds for on-demand transportation services for low-income senior citizens. The County adopted a resolution on March 2, 2010 urging the Florida Legislature to authorize the use of Charter County Transportation System Surtax proceeds for on-demand transit service for low-income senior citizens.<sup>4</sup> A change to §212.055, *F.S.* was requested by the County as part of its 2010 legislative package. The State Legislature enacted CS/HB 1271 which was effective on July 1, 2010 and which expressly authorized the use of discretionary surtax funds for the expansion, operation and maintenance of on-demand transportation services.<sup>5</sup> The amendment to the state law defines on-demand transportation services as:

*...the term on-demand transportation services means ...transportation provided between flexible points of origin and destination selected by individual users with such service being provided at a time that it is agreed upon by the user and the provider of the service that is not fixed-schedule or fixed-route in nature.*<sup>6</sup>

The City Commission adopted a Resolution on July 20, 2010 urging the County to enact procedures to amend its Charter County Surtax Ordinance to be consistent with the newly adopted state law regarding on-demand transportation services.<sup>7</sup>

## ANALYSIS

Applicable state law, which originally authorized the discretionary sales surtax, requires voter approval to levy a sales surtax for transportation.<sup>8</sup> The enabling state statute, §215.055, *F.S.* does not provide that every use of these proceeds by a City that is receiving its portion of the surtax, per an interlocal agreement with the County, must be subject to a county wide referendum.

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<sup>3</sup> The language includes: the County Commission shall not delete or materially change any County project contained in the list attached as Exhibit 1 to this article nor add any project to the list except in accordance with the procedures set forth in this subsection (d). A proposed deletion, material change or addition of a County project shall be initially reviewed by the Citizens' Independent Transportation Trust ("Trust"), which shall forward a recommendation thereon to the County Commission. The County Commission may either accept or reject the Trust's recommendation. If the County Commission rejects the recommendation, the matter shall be referred back to the Trust for its reconsideration and issuance of a reconsidered recommendation to the County Commission. The County Commission may approve, change or reject the Trust's reconsidered recommendation. A two-thirds vote of the Commission membership shall be required to take action other than as contained in the reconsidered recommendation of the Trust. The foregoing notwithstanding, the list of County projects contained in Exhibit 1 may be changed as a result of the MPO process as mandated by federal and state law. §29-124 (d), County Code.

<sup>4</sup> Cf. County Resolution No. R-276-10 (the Resolution notably provides in the pertinent portion: Whereas this Board desires to urge the legislature to amend section §212.055 to authorize the use of Charter County Transportation System Surtax proceeds for on-demand transit service for low-income senior citizens in the event the half penny transit surtax goes back to the voters at some future time)

<sup>5</sup> §212.055 (1), *F.S.* (2010)

<sup>6</sup> §212.055(1) (e), *F.S.* 2010

<sup>7</sup> City Resolution R-10-0134.

<sup>8</sup> §212.055(1), *F.S.* "CHARTER COUNTY AND REGIONAL TRANSPORTATION SYSTEM SURTAX".

A recent amendment (CS/HB 1271) to the applicable state statute changed the specific subsection that provides for County/City Interlocal Agreements regarding a municipality's use of the tax to expressly provide that on-demand transportation services was an allowable expenditure. Similarly, no provision of the County Surtax Ordinance provides that any new, lawful and allowable expenditure of these surtax proceeds requires a new county wide referendum for approval.

The County ordinance for the sales surtax states that the tax would take effect on January 1, 2003, provided that the question of whether the County shall levy a one-half cent of one (1) percent sales surtax pursuant to §212.055(1) F.S., was approved by a majority vote of the electorate. No express provision of the law requires that each expenditure allowed by law demands a separate, independent approval by the voters in a county wide referendum.

The only municipality in the County that has funded on-demand transportation with these proceeds is the City of Miami. It is arguably an unreasonable interpretation of this law to require a county wide referendum for such a localized expenditure.

The County Surtax Ordinance provides mechanisms which have been employed by the County in the past to amend those County projects funded with the proceeds which are referenced above.<sup>9</sup> The County Commission has amended the list of transportation projects appearing on Exhibit 1 by Resolution.

The County could also consider amending the applicable provision of its ordinance which currently provides:

*Surtax proceeds may only be expended for the transportation of transit purposes specified in Section 212.055(1) (d), as the same may be amended and supplemented from time to time are hereby incorporated herein.*

The Florida Supreme Court has held that where an ordinance dealing with service charges which fluctuate frequently according to the needs of the municipality and demands of the citizens does not require a referendum as opposed to an ordinance that makes extensive improvements to a public utility and incurs over a \$2,000,000 debt.<sup>10</sup> In this case, the use of the surtax will likely vary depending on the needs of the citizens of a municipality.

Similarly, the Florida Supreme Court has also found "where an ordinance which shows an intent to form a permanent rule of government is one of permanent operation within requirement, that measure must be of permanent operation in order to be submitted to electors

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<sup>9</sup> §29-124(d), County Code.

In an e mail dated July 9, 2010 from Assistant County Attorney Alexander Bokor to City Transportation Planner Lilia Medina, Mr. Bokor opined that on-demand transportation services constituted a new use of surtax funds not allowed at the time the voters approved and implemented the discretionary half-penny sales surtax. Accordingly, the County maintains this law makes funding of on-demand services through the transit surtax permissible but it would first require approval by the voters. The County further points out that the "Whereas Clause" in County Resolution No. R-276-10 evidences that this further referendum approval was the County's intention. Upon inquiry regarding a formal opinion, we have been advised that this statement was the formal opinion of the County Attorney's Office although it was not rendered as such.

<sup>10</sup> *Lake Worth v. State*, 111 So 2d. 433, 435 (Fla. 1959).

under initiative and referendum statute”.<sup>11</sup> The original ordinance is a permanent rule of government, while the exhibit list that includes the individual projects is temporary. A change to an individual project is not a permanent operation that requires submission to the electorate.

Furthermore, a referendum is not required for an ordinance that relates to actions of a City Commission on subjects of temporary and special character that are classified as administrative.<sup>12</sup> Here, the exhibit list is merely a list for including projects that will likely change from time to time depending on demand, not a change to the entire ordinance.

### **CONCLUSION**

In my opinion, a county wide approval by referendum is not legally required to lawfully implement the use of discretionary sales surtax proceeds by the City of Miami for on-demand transportation.

The County is the taxing authority who levies, imposes and provides for the use of surtax proceeds. County approval is required for the City expenditure of these proceeds for on-demand transportation services but that approval could be accomplished legislatively by the Board of County Commissioners.

cc: Carlos Migoya, City Manager

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<sup>11</sup> *State v. St. Petersburg*, 61 So. 2d 416, 419 (Fla. 1952).

<sup>12</sup> *Id.* at 419.