

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - 13-002

TO: Francis Suarez, Commissioner
Office of Commissioner - District 4 - COM
FROM: Julie O. Br~~o~~, City Attorney
DATE: April 22, 2013
RE: Authority of the Chief of Police

You asked substantially the following question:

Whether the Chief of Police of the City of Miami is authorized, pursuant to Florida law or City Charter, to provide police services for the protection of an art gallery in the Wynwood neighborhood of Miami?

Unless legislative or judicially determined otherwise, the Chief of Police for the City of Miami has the apparent authority to authorize on-duty personnel to provide police services for the protection of an art gallery in the Wynwood neighborhood of Miami.

This request relates to the provision of police services to the Gary Nader Fine Art Gallery at 62 NE 27th Street by on-duty City of Miami police officers. The Chief of Police indicated in a memorandum to the City Manager, dated April 10, 2013, that he decided to assign police personnel to the Gary Nader Fine Art Gallery because it was showcasing an exhibit of works of art valued at \$500 million. The exhibit was on loan from a private art collector from Portugal. While the request touches on both legal and policy issues, this response will be limited to a discussion of the legal issues.

It is well established that municipalities have been granted home rule powers to exercise any power for municipal purposes except when expressly prohibited by law.¹ The broad nature of this grant of power was recognized by the Florida Supreme Court in *State v. City of Sunrise*, 354 So.2d 1206, 1209 (Fla. 1978), when the court noted:

“Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid 'municipal purpose.' It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.”

Thus, the above-referenced power is tempered by the basic proposition that municipal funds may be used only for a municipal purpose. The public purpose doctrine is a development of the common law, but it has at times been deemed to flow from federal and state constitutional due process clauses, as well as from somewhat more specific clauses found in various state constitutions. It is, in effect, a constitutional requirement in those states having constitutional

¹ See *Op. Att'y Gen. Fla. 2006-12 (2006)*; §166.021, Fla. Stat.; and *Art. VIII, § 2(b), Fla. Const.*

clauses prohibiting local governments from making gifts, donations, or grants to private individuals or corporations.²

Article VII, §10, Fla. Const. prohibits the use of public funds for a private purpose, by precluding the state, a county or municipality or agency thereof from using its taxing power or credit to aid any private interest or individual. The purpose of this constitutional provision is to "protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited." *Bannon v. Port of Palm Beach District*, 246 So.2d 737, 741 (Fla. 1971). And see, *State v. Town of North Miami*, 59 So.2d 779 (Fla. 1952), and *Bailey v. City of Tampa*, 111 So. 119 (Fla. 1926).

The determination of what constitutes a valid municipal purpose for the expenditure of public funds is generally a factual determination for the legislative and governing body involved. *State v. Housing Finance Authority of Polk County*, 376 S0.2d 1158 (Fla. 1979). The test for the expenditure of public funds by a municipality or other governmental entity in Florida is whether the expenditure is for a purpose which primarily benefits the public; a benefit, if any, to private interests may be only secondary and incidental.³

City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983), determined that whenever a municipality exercises its powers, a two-tiered question is presented. First, was the action taken for a municipal purposes, and if so, was that action *expressly* prohibited by the constitution, general or special law, or city or county charter?

No constitutional provision or enactment exists which prohibits a city from authorizing police officers to provide police services to a private art gallery such as in this case. The City of Miami Code delegates all of the affairs of the police department to the Chief of Police.⁴ Thus, the only question is whether such protection constitutes a municipal purpose.

Section 166.021(2) Fla. Stat., defines "municipal purpose" as "any activity or power which may be exercised by the state or its political subdivision." In determining whether an activity is a valid "municipal purpose", review of case law regarding what constitutes a "municipal purpose" is necessary.

Recently, in *Gidman*, the supreme court held that provision of day care educational facilities is a valid municipal purpose. The court noted that the term "municipal purpose" has been broadly interpreted and has included such activities as maintenance and operation of a radio broadcasting system by a city. See *State v. City of Jacksonville*, 50 So.2d 532 (Fla. 1951). In *City of Jacksonville*, the court stated:

² See *Antieau on Local Government Law*, Second Edition § 67.04

³ See *Op. Att'y Gen. Fla. 90-08 (1990)*.

⁴ See § 42-3 of the City of Miami Code which provides: "Subject to the supervision and control of the city manager in all matters, the director of the police department shall administer the affairs of the department which shall include the immediate direction and control of the police force, and he is charged with responsibilities for the prevention, control and suppression of crime in the city. The responsibilities of the police department shall include, but not be limited to, the activities of police administration, traffic control, police patrols, training, criminal investigation, vehicle inspection, police property, police records and the complaint center."

Though there was a time when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality.

Other cases have upheld a city's power to construct and operate a parking garage, *Gate City Garage v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953), build and operate a marina and civic auditorium, *Panama City v. State*, 93 So.2d 608 (Fla. 1957), acquire and maintain a golf course, *West v. Town of Lake Placid*, 97 Fla. 127, 120 So. 361 (1929), provide fishing facilities in a public park and gain revenue by leasing a portion of the park to a business firm for construction and operation of a fishing pier, *Sunny Isles Fishing Pier v. Dade County*, 79 So.2d 667 (Fla. 1955) and own and operate an auditorium, including booking attractions for the auditorium. *Starlight Corp. v. City of Miami Beach*, 57 So.2d 6 (Fla. 1952). See also *Panama City v. Seven Seas Restaurant, Inc.*, 180 So.2d 190 (Fla. 1st DCA 1965) (Panama City empowered to furnish catering services to organizations renting city civic center). These cases indicate that not only does a municipality in Florida have the power to engage in proprietary functions so long as such power is exercised for "municipal purposes" but also the mere fact that the city operated service competes with a privately owned business does not invalidate the city's enterprise. See *Starlight Corp. v. City of Miami Beach*; *Gate City Garage v. City of Jacksonville*.

In *State v. City of Miami*, 379 So.2d 651 (Fla. 1980), the Supreme Court, in validating revenue bonds to finance a convention center, found that the facility served a "public purpose" because it would provide a forum for educational, civic and commercial activities and would increase tourism and trade. While that case dealt with the term "public purpose," it is instructive on the issue here. See *Gate City Garage v. City of Jacksonville* (wherein the Supreme Court indicated that the phrases "municipal purpose" and "public purpose" are similar). In another case, *City of Jacksonville v. Oldham*, 112 Fla. 502, 150 So. 619 (1933), the Supreme Court held that a city may levy taxes to promote and advertise the community. See also, *Winter Park v. Montesi*, 448 So. 2d 1242, (Fla. 5th DCA 1984).

The Supreme Court noted in *State v. Board of Control, Fla.*, 66 So. 2d 209, (Fla. 1953) that "[t]he mere fact that someone engaged in private business for private gain will be benefited by every public improvement undertaken by the government or a governmental agency, should not and does not deprive such improvement of its public character or detract from the fact that it primarily serves a public purpose. An incidental use or benefit which may be of some private benefit is not the proper test in determining whether or not the project is for a public purpose."

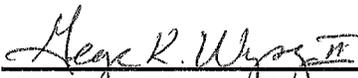
The Chief of Police explained with perspicacity and set forth in detail the community worth of the exhibit and its manifest public purpose as a community asset. The Chief indicated in his memorandum to the City Manager that "[t]he police protection [was] not for Mr. Nader or his business; it [was] for the art collection, which does not even belong to Mr. Nader, and [for] the

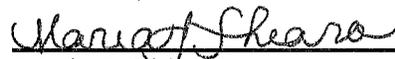
patrons visiting the exhibit, including students⁵ who may never again have the opportunity to experience such an exhibit.”

Lastly, it appears that the City Manager, in a memorandum to the Mayor and City Commission, dated April 10, 2010, determined as a matter of policy that the Chief of Police’s use of police resources to protect the art was “an example of good, crime prevention-oriented policing consistent with the duties of the Office of the Chief of Police” and served a public purpose.

PREPARED BY:

REVIEWED BY:


George K. Wyson III
Assistant City Attorney


Maria J. Charo
Deputy City Attorney

cc: Honorable Mayor and Members of the City Commission
Johnny Martinez P.E., City Manager

⁵ Mr. Nader recently sent a letter to the Chief of Police indicating that “without [the Chief’s] support [the] show wouldn’t [have been] possible.” Mr. Nader further indicated that the gallery was visited by Gulliver Academy, Barbara Goldberg Senior High, Shenandoah Middle School, Olympia Heights Elementary, Glades Middle School, FIU, Miami International University, *inter alios*.

CITY OF MIAMI, FLORIDA

INTER-OFFICE MEMORANDUM

to: Honorable Mayor and Members of the
City Commission

DATE: April 10, 2013

FILE:

SUBJECT: Use of Police Resources

FROM: Johnny Martinez, P.E.
City Manager

REFERENCES:

ENCLOSURES:

After reviewing Chief Orosa's memorandum and taking into consideration the legal advice of the City Attorney's Office, I support Chief Orosa's decision to use police personnel for not-of-profit events which serve a public purpose, to include the police services provided at the Gary Nader Art Gallery earlier this year. The Chief of Police has the duty, under the City Charter and Code, to provide for the safety and security of all persons within the City of Miami, and it is my belief that his use of police resources in this case was an example of good, crime prevention-oriented policing consistent with the duties of the Office of the Chief of Police.

MO:ara

P-mailed to all
electd officials
on 9/15/13

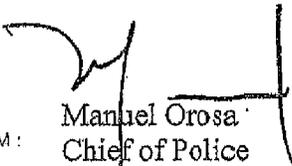
CITY OF MIAMI, FLORIDA

INTER-OFFICE MEMORANDUM

TO : Johnny Martinez, P.E.
City Manager

DATE : April 10, 2013

FILE :

FROM : 
Manuel Orosa
Chief of Police

SUBJECT : Use of Police Resources

REFERENCES :

ENCLOSURES:

Pursuant to our meeting with the Honorable Commissioner Francis Suarez on April 8, 2013 regarding the use of police resources to provide security at an art gallery in the Wynwood Art District, I offer the following rationale for my discretionary action.

In January 2013, I made the decision to assign police personnel to Mr. Gary Nader's art gallery. My decision was consistent with the manner in which the Miami Police Department has used police personnel for other not-for-profit purposes. Mr. Nader's gallery was hosting a \$500 million art collection on loan from a Portuguese museum. The collection has never been shown in the Western Hemisphere, and it was being displayed at no charge to anyone wishing to see it, which was one of my preconditions for agreeing to provide police services at no cost. Another precondition that I imposed upon Mr. Nader as part of our agreement was that school field trips to the gallery would have to be hosted so that local children would have the opportunity to learn from and experience the exhibit. Furthermore, whether the exhibit was located at Mr. Nader's gallery is inconsequential. I would have agreed to provide the police service in question at any location where the collection was to be displayed. The police protection is not for Mr. Nader or his business; it is for the art collection, which does not even belong to Mr. Nader, and the patrons visiting the exhibit, including students who may never again have the opportunity to experience such an exhibit.

The Miami Police Department routinely uses personnel to protect life and property at gun buybacks, food giveaways (e.g., CAMACOL), backpack and school supply giveaways, school demonstrations, City Commission meetings and other public-purpose functions. Mr. Nader's gallery met the same threshold in that it was an exhibit open to the public at no charge. The Miami Police Department even provides police officers at for-profit commercial areas likely to attract large volumes of pedestrian and/or vehicular traffic. The following locations are staffed 7 days a week by beat officers, who typically patrol on foot or on a bicycle:

- Mary Brickell Village – 3 officers
- CocoWalk – 2 officers
- Bayside Marketplace – 2 officers
- NE 79th Street Shopping Center – 1 officer
- NW 20th Street/Allapattah Business District – 1 officer
- Wynwood Garment District – 1 officer
- Design District – 2 officers

- Midtown Miami – 2 officers
- NW 7th Avenue/Model City Commercial Area – 1 officer
- NW 3rd Avenue/Overtown Commercial Area – 2 officers
- SW 8th Street/“Calle Ocho” – 2 officers

Furthermore, the area known as the “Downtown core” has 23 assigned beat officers. Once the Brickell CitiCentre opens to the public, we anticipate that we will be assigning anywhere between 6 to 10 officers there, depending on the number of businesses and the number of people it attracts. We recently provided police protection (both uniformed police officers and plainclothes detectives) for Cuban blogger Yoani Sanchez when she visited Miami, and we provided police services for Bishop Agustin Roman’s funeral services.

The overriding theme present in all of the abovementioned uses of police services is the protection of life and property without favoring any one private entity. As the Chief of Police, it is my duty to prevent crime, whenever possible. When I weighed my decision to use police personnel at Mr. Nader’s gallery, I considered long-lasting effects of a violent crime against a patron or a large-scale theft or vandalism in our burgeoning art district. Such an incident could adversely affect the area’s sense of security that has taken many years to build, cripple the Wynwood art scene, and damage tourism. Therefore, I respectfully stand by my decision, and I would carefully consider on a case-by-case basis any other local entity hosting a not-for-profit, public purpose event of this magnitude.

MO:ara

cc: Honorable Mayor and Members of the City Commission

Gary Nader *fine art*

Miami, April 16, 2013

Chief of Police Manuel Orosa
Miami Police Department
400 NW 2nd Avenue
Miami, Florida 33128

REF: "Masterpieces from the Berardo Collection"

Dear Chief of Police Manuel Orosa:

Please accept our sincere gratitude for your support during the time that the above mentioned was exhibited.

We specially want to commend the City of Miami Police for its efforts on this project and we are proud to have you as part of our team in taking Miami's cultural setting to the next level. Without your support this show wouldnt be possible.

We were visited by Gulliver Academy Barbara Goldberg Senior High, Shenandoah Middle School, Olympia Heights Elementary, Glades Middle School, FIU, Miami International University, Lowe Art Museum, Boca Museum, Ft. Lauderdale Museum, Miami Art Museum, Frost Museum, thousands of locals, people from other states and abroad were able to enjoy, admire and be exposed such exhibit.

Again, thank you for making a show of such magnitude accessible to everyone. We look forward to future partnerships.

Best regards



Gary Nader.

