MEMORANDUM

Office of the City Attorney

Phone: 334-5011/Fax 334-2229

Box 46

TO: Mayor and City Commissioners
Charter Officers

DATE: November 24, 2014

FROM: Nicolle M. Shalley, City Attorney
Elizabeth A. Waratuke, Litigation Attorney

SUBJECT: Fire Services Special Assessment – Places of Religious Assembly and Not-for-Profit Organizations

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Background/Questions

At its October 22, 2014 General Policy Committee meeting, the City Commission discussed the Fire Services Special Assessment. During the meeting, two questions were raised:

(1) Can the City exempt places of religious assembly and not-for-profit organizations from paying the Fire Services Special Assessment? or

(2) Can the City refund (from funds other than the assessment) the Fire Services Special Assessment paid each year by places of religious assembly and not-for-profit organizations?

At the meeting, the consultant who has prepared the City's methodology to apportion the benefit of fire services among different types of property each year stated that "some" or a "majority" of local governments exempt places of religious assembly and not-for-profit organizations from their assessments. In addition, a City Commissioner stated that in doing internet research it appeared that Section 170.201(2), Florida Statutes, allows the City to provide such an exemption.

Short Answer

Extensive factual and legal research and analysis of these issues was done by this Office prior to the initial adoption of the Fire Services Special Assessment and was communicated to the City Commission in a Memorandum dated July 6, 2010 attached as **Attachment A**. In addition, each year when the City re-imposes the Fire Services Special Assessment, this Office researches and confirms the current status of the law.

It was, and continues to be, the opinion of this Office that it is not legally defensible to exempt places of religious assembly and not-for-profit organizations from the Fire Services Special Assessment (or provide them a refund) when they receive the benefit of fire services. This Office is concerned with the significant fiscal liability the City would face if a court were to invalidate the Assessment and order a refund of all Assessments paid (for a four year period) based on a finding that by exempting certain properties the City failed to equitably and reasonably apportioned the cost of the service among all properties that benefited.

Legal Analysis

The courts have devised and consistently applied a 2-prong test to determine whether a charge imposed by a city is a valid special assessment lawfully imposed under its home rule authority. The name given to the charge by the city is not controlling – it is the characteristics of the charge and how it is imposed that the court analyzes. If the special assessment does not meet both prongs of the test, courts have consistently held that the special assessment is invalid and thus constituted an unlawful tax that should be refunded to all who paid because the city did not have the authority to impose the charge.

The test is as follows: The court first asks "does the property receive a special benefit from the government service provided?" If the answer is no, the property cannot be assessed for the service. This is the reason that the City exempts vacant property from the Fire Services Special Assessment. If the answer is yes, then the court asks a second question "is the cost of providing the government service fairly and reasonably apportioned among the properties that receive the benefit?" If the answer is yes, the assessment has met both prongs of the test and is a valid special assessment. If the answer is no, the assessment is an unlawful tax. This second prong is the reason that each year the City engages a consultant to prepare a methodology that fairly and reasonably apportions the cost/benefit among the various types of properties that benefit from fire services.

So to apply this test to places of religious assembly and not-for-profit organizations, one first asks -- do they receive a benefit from fire services like other improved property in the City? If the answer is yes, but the City exempts them, then the second prong of the test cannot be met because the City has failed to fairly and reasonably apportion and assess the cost for the service among all the properties that receive the benefit.

A finding by a court that a local government's special assessment is invalid (i.e., does not meet both prongs of the test) holds significant consequences for a local government. The courts have generally ordered a refund of all monies paid going back four years before the suit was filed. This occurred in a number of communities who included emergency medical service (EMS) charges (which the court found did not meet the first prong because EMS provides a benefit to persons, not property) in their fire special assessments. Miami, for example, faced exposure of $24,000,000 after its fire rescue assessment was invalidated. Some courts have not ordered refunds due to equitable consideration if it was an "intolerable burden" (namely, the government was at its millage cap and had no ability to raise the funds for a refund) and the assessment had been applied "across the board."

In addition to the significant fiscal liability that the City would face if ordered to refund 4 years of Fire Services Special Assessment Revenue (approximately $20,000,000), it is important to remember that the Fire Services Special Assessment is one of the primary sources of revenue that the City identifies as legally available non-ad valorem revenues for repayment of Revenue Bonds. In the current "Capital Improvement Revenue Bonds, Series 2014" issue, the Preliminary Official Statement identifies the Fire Services Special Assessment ($5,022,902) as the fourth largest source of non-ad valorem revenue (based on the 2013 audited financial statements) following the General Fund Transfer ($36,656,458), the Public Service Tax ($10,780,430) and the Half Cent Sales Tax ($6,532,142).

Another issue with exempting places of religious assembly from the Fire Services Special Assessment (or with the City refunding the Assessment paid) arises from Florida's Constitutional provision that not only prohibits laws respecting the establishment of religion but imposes further restrictions on the state's involvement with religious institutions by prohibiting tax revenues to "directly or indirectly" aid "any church ... or any sectarian institution." Since those who pay the Fire Services Special Assessment cannot be charged any more than what their property benefits from the Assessment, the shortfall attributed to exempting the places of religious assembly must necessarily come from the City's general revenue fund, thus using tax revenues to "directly or indirectly" aid the sectarian institution, in violation of the State Constitution. This Office addressed this issue in correspondence dated August 12, 2010 attached as **Attachment B**.

At the time of the imposition of the initial assessment, the City Commission considered that paying the Fire Services Special Assessment may adversely affect the financial ability of community service organizations (including places of religious assembly and not-for-profits) to provide needed public services. For that reason, the City established the Community Grant Program to allow organizations to apply for and receive grants for up to $3,000 each year to provide identified public services. It is legally defensible for the City to expend non-assessment funds for grant programs open to all organizations that serve the identified public purpose(s).

As to the statement by the methodology consultant that "some" or a "majority" of local governments exempt places of religious assembly and not for profits from the assessment, this Office notes that the consultant is not a licensed attorney and that no legal support or legal opinion for an exemption has been provided by the consultant. At the time the City imposed the Fire Services Special Assessment, this Office reviewed the practices of other local governments in Florida, in particular whether any exempted places of religious assembly and not-for-profits and if so, did they have legal support for such exemptions. A total of 75 cities and counties were contacted by this Office. The results from those who responded are attached as **Attachment C**. Of those who provided exemptions, none reported any legal challenges to the exemptions, nor did they identify any legal authority for the exemptions. When Alachua County was considering its special assessment, the Alachua County Attorney advised the County that the safest course was to not provide exemptions and that a safer alternative would be to provide financial assistance to community organizations that serve a public purpose by providing needed community services, such as with a grant program like the City offers.

This Office is aware of no reported cases that discuss whether exemptions to special assessments may lawfully be granted. However, there are cases in which places of religious assembly claimed they should be exempt from assessments. The courts, including the Florida Supreme Court, have consistently applied the two-prong test and held that special assessments are lawfully imposed on places of religious assembly when their properties receive the benefit of the service.

This Office also considered whether Chapter 170 of the Florida Statutes could be relied on as lawful support for the exemption of places of religious assembly and not-for-profit organizations from the Fire Services Special Assessment. This Office concluded that it should not because Chapter 170 is not the authority under which the City imposed the special assessment. In addition, Chapter 170 is internally inconsistent and one portion of Section 170.201 (the section cited by the City Commissioner) which authorizes assessments for emergency medical services has been invalidated by the Florida Supreme Court. Our correspondence dated July 18, 2008 is attached as **Attachment D**.

INTEROFFICE MEMORANDUM

Office of the City Attorney

TO: Mayor and City Commission **DATE:** July 6, 2010

FROM: City Attorney

SUBJECT: **"Exemptions" from Special Assessments**

ISSUE

The City Commission has asked whether places of religious assembly and not-for-profit entities can lawfully be "exempted" from paying the fire services special assessment. Based on many years of litigating in this area, including challenging the County's imposition of the "privilege fee" and defending the City's stormwater utility fee, this Office's opinion is that all owners of property that receive a benefit from the service for which the charge is being made, unless exempt as a matter of law, are required to pay the special assessment.

In addition, the payment of the fire services special assessment for places of religious assembly with public funds would likely violate Article I, Section III of the Florida Constitution as recently held by a Florida Appellate Court.

TAXES, FEES, AND SPECIAL ASSESSMENTS

The City can raise revenue by three means: taxes, fees, and special assessments. If one places these three methods on a continuum, taxes would be on one end, fees on the far other end, and special assessments would be somewhere in the middle as special assessments share characteristics of both taxes and fees.

Taxes are levied throughout the taxing unit for the benefit of the residents and "are imposed under the theory that contribution must be made by the community at large to support the various functions of the government". Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180 (Fla. 1996). There is no requirement that there be a relationship between the amount paid and services used, in fact, one need not even use the services funded through taxes. For example, those without children still pay taxes to fund the school system.

Fees, on the other hand, "are charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society... and they are paid by choice, in that the party paying the fee has the option of not utilizing the government service and thereby avoiding the charge". City of Gainesville v. State, Dept. of Transp., 778 So.2d 519 (Fla. 1st DCA 2001). Some reasonable relationship generally exists between the amount of the fee and the value of the service.

As noted, special assessments share characteristics of both fees and taxes. While both taxes and special assessments are alike in that they are mandatory (as opposed generally to fees), they are different in that while taxes require no benefit or use of the services by the taxpayer,

special assessments require that the land burdened by the assessment receive a special benefit from the assessment. There must also be a reasonable relationship between the amount charged and the benefit received. SMM Properties, Inc. v. City of North Lauderdale, 760 So.2d 998 (Fla. 4th DCA 2000).

The three revenue sources are also different as to whom can be charged. The State, counties and school boards are "immune" from taxation. Cities are mostly "exempt" by provisions of the Florida Constitution. As to places of religious assembly and not-for-profit entities, the Florida Constitution provides that portions of property that are used predominately for religious or charitable purposes may be exempted from taxation by general law if the legislature decides to do so. The Florida legislature has exempted places of religious assembly and not-for-profits from taxes.

Unlike taxes, at the other end of the spectrum, fees must be paid by *everyone who* receives the service or benefit. Special assessments, again in the middle, are enough like taxes that courts have held that government entities cannot be charged a special assessment without a statute specifically authorizing the assessment against them. See e.g., City of Gainesville v. State, 863 So. 2d 138, 143 (Fla. 2003) ("As a state agency, however, DOT [Department of Transportation] would be exempt from special assessments absent a statute specifically authorizing, either explicitly or 'by necessary implication', special assessments on state property"). There is no statute authorizing the imposition of a fire special assessment on the State. For this reason, the State (which includes the University of Florida), the County, and the School Board cannot be charged the fire special assessment. However, government entities can enter into service agreements that authorize payment in exchange for receipt of the service.

The three revenue sources are also different as far as the authority of the City to levy. The City is the most restricted in the levy of taxes as the ability to raise taxes must be constitutionally based or specifically authorized by the legislature. The City has no independent or home rule authority to levy a tax.

TEST FOR A VALID SPECIAL ASSESSMENT

Because special assessments share characteristics of taxes (and to avoid having taxes disguised as special assessments), the courts have devised a strict test to determine whether a charge is a valid special assessment as opposed to a tax. To determine whether the charge is a valid special assessment, two questions are asked. First, does the property receive a special benefit from the service provided? If the answer is no, the property cannot be assessed for the service. If the answer is yes, that the property does receive a special benefit from the service, a second question is asked whether the assessment is fairly and reasonably apportioned among the properties that receive the benefit. If the answer is yes, the assessment has met both prongs of the test and is a valid special assessment.

In applying this test to places of religious assembly and not-for-profit entities, one must ask whether their properties receive a special benefit from the service provided. The answer is yes, they receive a benefit from fire services like any other improved property in the City. If the properties are "exempted" even though they receive a benefit, the second prong for a valid special assessment has been compromised in that the assessment is not being fairly and reasonably apportioned among all the properties receiving the benefit.

CASE LAW ON EXEMPTING PLACES OF RELIGIOUS ASSEMBLY AND NOT-FOR-PROFITS

There is no reported case law that specifically deals with the issues of whether places of religious assembly and not-for-profit organizations can be exempted from special assessments. The only case law is where places of religious assembly have challenged the imposition of special assessment against them and the courts have upheld the imposition of the assessment against them. For example, in a series of cases involving Sarasota County, a number of churches located within the county challenged the county's imposition of fire special assessments and stormwater special assessments against them. The trial court upheld the fire special assessment against the churches, but denied the stormwater special assessment against them for reasons not relevant here. Both the churches and the county appealed. The churches argued that the fire special assessment should not be applied to them and the county argued that the stormwater special assessment should apply to the churches as well. The court of appeal upheld the imposition of fire special assessments against the churches and again denied the imposition of stormwater assessment against the churches.

The churches gave up their argument that the fire special assessment should not apply to them. The County, however, appealed to the Florida Supreme Court, arguing that the stormwater special assessment should also apply to the churches. The Florida Supreme Court agreed and found that the churches should be assessed the stormwater assessment, stating that:

> "we find that: (1) developed property, such as that owned by the Churches, receives the special benefit of the treatment of contaminated stormwater runoff caused primarily by the improvements on such property, and (2) the method of apportionment used by the County is proper because it requires the properties that create the contaminated stormwater runoff to pay for the treatment of that runoff."

Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180, 184 (Fla. 1996). The Court went on to say:

> "Notably, under the County's special assessment, the Churches and other owners of developed property are now required to contribute to the costs of the stormwater management facility based on their relative contribution of polluted stormwater runoff. Previously, the costs of stormwater services in the County were funded through a flat tax. Owners of both developed and undeveloped property paid for stormwater services without regard to the property's relative contribution of polluted runoff. Moreover, given that the Churches are exempt from taxation, they paid no money whatsoever towards the cost of the specific benefits received by these services. Although we do not find that the previous funding of stormwater services through taxation was inappropriate, we do find that the stormwater funding through the special assessment at issue

> complies with the dictates of chapter 403 and is a more appropriate funding mechanism under the intent of that statute."

REMEDY IF THE SPECIAL ASSESSMENT IS FOUND INVALID

If the special assessment does not meet both prongs of the test, it will be found invalid. If invalid, the courts have generally ordered a refund of amounts paid, under the theory that the charge was an illegal tax. See Nelson v. Wakulla County, 905 So.2d 936 (Fla. 1st DCA 2005) ("A taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment.") This is the situation that happened to a number of communities who included EMS charges in their fire assessments (which was found to not provide a special benefit to the property, but instead to the person). The City of Miami, for example, faced a 24 million dollar exposure after a class action successfully invalidated its fire assessment ordinance because of the inclusion of charges for emergency medical services in the assessment.

CASE LAW ON USING PUBLIC FUNDS TO AID PLACES OF RELIGIOUS ASSEMBLY

A recent case has come out of the First District Court of Appeal regarding the interpretation of the Religious Freedom article of the Florida Constitution. Council for Secular Humanism, Inc., et. al. v. Walter A. McNeil, in his official capacity as Secretary of Corrections of Florida, Prisoners of Christ, Inc., et. al., WL 1658788 (Fla. 1st DCA, 2010). Article I, Section 3 of the Florida Constitution provides

> 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

At issue in the case was the language of the third sentence "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...." The Department of Corrections entered into paid contracts with faith based entities to provide faith based substance abuse post release transitional housing programs. Plaintiffs sought to have the court prohibit the payment of State money to support these faith based programs. The Court noted that Florida's no-aid provision was not a per se ban to pay government funds to a religious entity to provide social services, but that the overriding purpose was to prohibit the use of state funds to promote religious or sectarian activities. The court stated

> In determining whether such programs violate the no-aid provision, the inquiry necessarily will be case-by-case and will consider such matters as whether the government-funded program is used to promote the religion of the provider, is significantly

sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another

ALACHUA COUNTY'S POSITION

At the meeting of June 3, 2010, several Commissioners inquired about the County's legal ability to exempt places of religious assembly from the special assessment.

The consultant to Alachua County advised the County that an exemption "could be based on a finding that such properties provide facilities and uses to their ownership, occupants or membership, as well as the public in general, that otherwise might be required to be provided by the County." The County Attorney did not render this opinion and in fact, advised the County Commission that the safest course was to not exempt the places of religious assembly and not-for-profits and that the basis for an exemption had not been tested in the courts. He advised that a safer alternative would be to reimburse places of religious assembly and not-for-profits for the services they provided to the county similar to the grant program established by the City.

CONCLUSION

The City has the authority to levy a fire service special assessment. Based on established case law, in order for a special assessment to be valid, all properties that receive the benefit of the service, except for properties exempted by law, must be charged the assessment. In other words, if properties of the places of religious assembly and not-for-profits receive the benefit of fire services, they should properly be charged the assessment. No property owner or class of owners may be exempt from the assessment without compromising the validity of the assessment.

Further, to exempt the properties of places of religious assembly and not-for-profits would require the City to identify other available legal revenues to pay their share of the assessment. The payment of public funds raises significant legal issues. In a recent case, the Court questioned payments made by the State to faith based organizations, finding the payments

may have been made in violation of the Florida Constitution's no aid provision. The State has requested that the Florida Supreme Court address the issue.

Prepared by: _____
Elizabeth A. Waratuke
Litigation Attorney

Submitted by: _____
Marion J. Radson
City Attorney

EAW/klm

cc: Brent Godshalk, City Auditor
Russ Blackburn, City Manager
Kurt M. Lannon, Clerk of the Commission
Cecil Howard, Equal Opportunity
Robert Hunzinger, General Manager - Utilities

Attachment "B"

150196A MOD

City of Gainesville
Office of the City Attorney

Marion J. Radson♦
City Attorney

♦Board Certified City, County & Local Government Law

Ronald D. Combs
Raymond O. Manasco, Jr.*
Stephanie M. Marchman
Daniel M. Nee♦
Nicolle M. Shalley
Elizabeth A. Waratuke♦

August 12, 2010

W. Gary Yeldell, Esquire
Wise Counsel Legal Services
120 SW Citrus Avenue
P.O. Box 189
Keystone Heights, FL 32656

Re: Email communication to City Commissioners regarding fire special assessment

Dear Mr. Yeldell,

I am in receipt of your email correspondence directed to Commissioners Henry, Donovan, and Hawkins regarding your threatened litigation in regard to the fire services special assessment. As you are aware, the City Attorney represents the City of Gainesville and the City Commission. Accordingly, pursuant to Rule 4-4.2 of the Rules of Professional Conduct, please do not communicate with our client regarding this matter i.e. litigation regarding the fire services special assessment, without the consent of this Office.

As to the merits of your threatened litigation, I attach to this letter a memorandum prepared by this office regarding the legality of assessing special assessments on places of religious assembly and the legal implications of exempting them from such assessments. I draw your attention specifically to the cases of Sarasota County v. Sarasota Church of Christ, Inc., 667 So.2d 180 (Fla. 1996) and Council for Secular Humanism, Inc. vs. McNeil, et. al., 2010 WL 1658788 (Fla. 1st DCA 2010). In Sarasota County and the DCA case preceding the Supreme Court opinion, the courts upheld the imposition of fire and stormwater special assessments against the churches, finding that since the church's properties received the special benefit of the service, they should be assessed the charge. In Council for Secular Humanism, the court examined the language of Article I, Section 3 of the Florida Constitution, "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury

P.O. Box 1110 (32602)
200 E. University Ave.
Room 425
Gainesville, Florida 32601

PHONE (352) 334-5011
FAX (352) 334-2229
City Hall and the City Attorney's Office are closed on Fridays
Hours: M-Th, 7-6

*Utilities Legal Services
P.O. Box 147117, Sta. A-138
Gainesville, Florida 32614
PHONE: (352) 393-1010
FAX: (352) 334-2277
Hours: M-F, 8-5

directly or indirectly in aid of any church..." to find that the overriding purpose was to prohibit the use of state funds to promote religious or sectarian activities.

If you would like to discuss this matter, please contact my office. Thank you.

Sincerely,

Elizabeth A. Waratuke
Litigation Attorney

EAW/klm
Enc.

Cc: Mayor and City Commissioners
Russ Blackburn
Paul Folkers

TOTAL NUMBER OF CITIES CONTACTED: 47

TOTAL NUMBER OF COUNTIES CONTACTED: 28

TOTAL NUMBER OF CITIES AND COUNTIES CONTACTED: 75

TOTAL NUMBER OF CITY RESPONSES: 12
IN ADDITION 7 RESPONSES WERE RECEIVED FROM ADDITIONAL CITIES WHO WERE NOT INITIALLY CONTACTED

TOTAL NUMBER OF COUNTY RESPONSES: 8

CITY OR COUNTY	FIRE SPECIAL ASSESSMENT IMPOSED	PLACES OF RELIGIOUS ASSEMBLY EXEMPTED	NOT FOR PROFITS EXEMPTED
Altamonte Springs	No		
Clearwater	No		
Cocoa Beach	No		
Crystal River	Yes	No	No
DeSoto County	Yes	Yes	No
Dunnellon	No		
Fort Lauderdale	Yes	Yes	Yes
Gilchrist County	Yes	Yes	Yes
Hawthorne	Yes	No	No
Hernando County	Yes	No	No
Leon County	No		
Levy County	Yes	No (But do pay the assessment on their behalf).	No (But do pay the assessment on their behalf).
Madison County	Yes	No	No
Marion County	Yes	Yes	No
Newberry	Yes	Yes	Yes
Orange County	In process	(No decision made)	(No decision made)
Osceola County	Yes	Yes	Yes
Pembroke Pines/Coral Springs/North Lauderdale/Tamarac/Oakland Park/Wilton Manors/Boynton Beach/Lighthouse Point	Yes	Yes	Yes
Pensacola	No		
St. Petersburg	No		
Waldo	No		
West Palm Beach	In process	(No decision made)	(No decision made)

No City or County attorney has rendered a written opinion that places of religious assembly or not for profits may be exempted from a special assessment.

No City or County has defended such an exemption in court.

CITY OF GAINESVILLE

Office of the City Attorney

Marion J. Radson
City Attorney

Ronald D. Combs
Charles L. Hauck
Stephanie M. Marchman
Natalie D. McKellips
Daniel M. Nee
Nicolle M. Shalley
Elizabeth A. Waratuke

July 18, 2008

Zana Dupee, Esquire
Bogin, Munns & Munns, P A
100 SW 75th Street, Suite 206
Gainesville, Florida 32607-5777

Dear Ms. Dupee,

I am writing in response to your comments at the July 16, 2008 City Commission meeting on the fire special assessment. Specifically, I am referring to your comments that §170.201 of Chapter 170, Florida Statutes authorizes the exemption of a religious institution from the levy of a fire service special assessment.

Mr. Radson and I were both aware of §170.201 and had looked at it on at least two occasions to see whether we could use that section to support an exemption for religious institutions and not for profits. A reading of the entirety of Chapter 170, Fla. Stat. indicates the limited authority for imposing specific types of special assessments pursuant to that chapter. See §170.01(2) "Special assessments may be levied only for the purposes enumerated in this section" (emphasis added). The purposes outlined are for limited types of capital improvements, i.e. streets, sidewalks, drainage, water mains, relocation of utilities, parks, mass transit, and if authorized by a vote, parking facilities. The special assessments authorized in Chapter 170 do not include special assessments for fire services.

Consequently, neither the City, nor the 16 cities and 8 counties whose fire services assessment ordinances and resolutions that we looked at, use Chapter 170 as authority for fire services assessments. Counties use Chapter 125 and cities use Chapter 166. Even those local governments that do exempt religious institutions and not for profits do not use that section you cited as their authority for such exemptions.

Finally, the Florida Supreme Court has already found unconstitutional a portion of the section that you cited. As you know, the Florida legislature cannot make lawful that which is unconstitutional.

Sincerely yours,

Elizabeth A. Waratuke
Litigation Attorney

EAW/klm
Cc: Mayor and City Commissioners
City Manager
Fire Chief