Appendix H - November 18, 2004 Memorandum from the City Attorney

MEMORANDUM

Office of the City Attorney

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TO: Regional Utilities Committee
Commissioner Ed Braddy, Chair
Commissioner Rick Bryant, Member

DATE: November 18, 2004

FROM: Marion J. Radson, City Attorney

SUBJECT: Alachua County – City of Gainesville Street Lights and Fire Hydrant Agreement

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This committee asked the City Attorney to issue a written opinion on two issues in regard to the existing streetlights and fire hydrant agreement with Alachua County: whether the City could unilaterally terminate the agreement, and second, the legal impact if these charges were paid for in a manner other than set out in the agreement. In short, it is unlikely that the City can unilaterally terminate the contract. As to the second issue, the charges can be paid for in a manner different than that specifically set out in the agreement, as long as certain conditions are met. In order to fully explain the answers to these issues, it is necessary to go through a little of the background that led to the agreement.

FACTUAL BACKGROUND

In December 1972, the City and the County entered into an interlocal agreement creating a Board comprised of City and County commissioners to make policy decisions regarding the electric, water and sanitary sewer systems. As part of the agreement, the County transferred all interest in the electric, water and sewer system it operated to the City, as well as all debt.

After operating under this agreement for several years, a lawsuit was filed by the County against the City regarding the "setting of utility rates". In December 1979, a settlement was reached. In pertinent part, it was agreed that the Board would be dissolved, leaving control of the utilities back in the City's hands. The City would reimburse the County for fire hydrants and streetlights in exchange for the benefit to the City of the City's utility equipment being located in County right of way. The reimbursement would not exceed the amount of money the City received from the levy of the surcharge in the unincorporated area. The agreement was to expire in September 1985. It was ultimately extended for an additional two years, with the County paying six months of the charges in the last year.

When the extension expired, the City took the position that the County needed to pay for the streetlights and fire hydrants in the unincorporated area. The County's position was that the City needed to pay because the City was getting the money from the surcharge in the unincorporated area. Lawsuits were threatened from both parties. An agreement was reached, negotiated by then Gainesville Mayor Cynthia Chestnut, resulting in the current streetlights and fire hydrant agreement.

FIRE HYDRANT AND STREET LIGHT SERVICES AGREEMENT

The agreement provides that the City is to install, operate and maintain fire hydrants and street lights in the unincorporated area under terms as set forth in the agreement. The utility bills the County for these services which the County is obligated to pay within 45 days. After the County makes payment, the City reimburses the County from the City's general fund an amount equal to that paid by the County. If the County imposes any charge on the City for the City's use of County right of way, that amount shall be offset against the reimbursement amount paid by the City. Further, the amount of reimbursement by the City in any fiscal year shall not exceed the amount of revenue from the surcharge the utility may transfer to the City's general fund. The City's utility retains the right to change the policies, practices, or procedures as long as the regulations apply equally to customers within and without the City. The agreement may be terminated by mutual agreement of the parties.

LEGAL ANALYSIS

Issue One

One issue raised is whether the contract is one "in perpetuity" so that the agreement could be terminated upon the City giving the County reasonable notice of its intent to terminate. It is unlikely that the City would prevail on an argument that the contract is "in perpetuity" or terminable at will.

This issue was addressed in the case of City of Gainesville v. Board of Control of the State of Florida, 81 So.2d 514 (Fla. 1955). In 1905 City of Gainesville representatives and members of the Board of Control of the State of Florida entered into an agreement to furnish free water to a university if the university would be built in the City. The purpose of the offer was to get the state to locate the university in the City. In 1950, the City started charging the University of Florida for water. The University refused to pay. The City filed an action that was eventually heard by the Florida Supreme Court, arguing that the agreement was void because it was "in perpetuity". The Court disagreed that the obligation was to exist perpetually, but stated instead, "[t]he time was to be measured by the existence of the University in Gainesville. We take judicial notice of the location as permanent but we do not indulge the clairvoyance that it will be perpetual". Id. at 518.

The agreement between the City and the County provides that it may be terminated upon the agreement of the parties. In addition, it provides other means by which aspects of the agreement may be modified by certain events, i.e., the imposition of a franchise fee by the County or changes in billing practices by the City.

Second, even if the agreement were "in perpetuity" courts have not hesitated to uphold the contract when there is continuing benefit flowing to the party seeking to break the contract. In this case, the City continues to get a benefit under the contract, the use of County right of way for the placement of its utility facilities. As the Court said in the City of Gainesville free water case, "[t]he contract contemplated a free service so long as the University remained in Gainesville, a continuing consideration being the exchange of the service for the continuing advantage". Id. Other cases have also recognized an exception to the at will termination of a perpetual contract when there is continuing benefit to the other entity. See City of Daytona Beach v. Stansfield, 258 So.2d 809 (Fla. 1972) whereby the City obtained a private entity's

water system and agreed as part of the acquisition not to charge those in the unincorporated area more than 1/3 again as much as those in the incorporated area. Even accepting the City's argument that the contract was "in perpetuity", the Florida Supreme Court held the contract could not be terminated at will, stating "[h]ere, however, the circumstances fall within the exception to that general proposition, i.e., where there is a continuing benefit to the City". Id. at 811.

Third, Section 125.42(2) Fla. Stat. provides that a county may grant a license "in perpetuity" for the use of county right of way for utility purposes. If a county has the authority to grant in perpetuity, necessarily a utility has the authority to accept in perpetuity.

Finally, owing to the circumstances surrounding the formation of the agreement, it could be argued that the agreement was in effect a settlement agreement to settle the ongoing dispute between the City and the County. In the case of City of Homestead v. Beard, 600 So.2d 450 (Fla. 1992) the Court stated that where a contract does not contain an express term of duration, "the court should determine the intent of the parties by examining the surrounding circumstances and by reasonably construing the agreement as a whole". Id. at 453. The Court noted that the agreement in that case involved the settlement of a territorial dispute and that "[p]arties usually enter into settlement agreements with the intention of permanently resolving their conflicts with respect to the subject matter of the disagreement". Id. at 454. The County could argue that the agreement was a settlement of its dispute with the City and intended to act as a permanent resolution of the dispute.

Issue Two

Even though it is unlikely that the City could unilaterally stop providing the streetlight and fire hydrant services outlined in the agreement, the City could pay for the charges in a manner other than set out in the Agreement. Section 2(h) of the agreement provides that "[t]he City reserves the right to modify, change, or amend its utility systems regulations including but not limited to regulations relating to the installation costs and expenses of street lights, as long as the regulations apply equally to the customers within and without the City". This means that the City could change the method of billing for fire hydrants and street lights as long as the method applied was the same inside the City as in the unincorporated area. For example, the City could include the costs for the streetlights and fire hydrants in its base rate for electric and water charges and bill the customer directly. As the County would no longer get a bill to pay, the City would no longer pay for these charges in the unincorporated area from the City's general fund. Therefore, customers in the City and unincorporated area would pay for street lights and fire hydrants as opposed to all the City's street light charges coming out of Public Works' budget and all the City's fire hydrant charges coming out of the fire department's budget.

This opinion does not address the policy decisions and the consequences thereof that are beyond the scope of this opinion.

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