M E M O R A N D U M

TO: Craig Leen
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RE: Utility Undergrounding Improvements

ISSUE

What potential new funding options exist for the undergrounding of electrical, cable, fiber, and other overhead utility lines?

BRIEF ANSWER

Aside from utilizing the City's existing revenue sources (i.e. Communications Services Tax, any shared local option sales tax, or other available non-ad valorem revenue sources)[1], there are two new funding options that the City may consider to fund the undergrounding of overhead utility facilities: (1) non-ad valorem assessments, and (2) general obligations bonds. The City may also use a combination of these and other funding sources to accomplish this project.

DISCUSSION

The undergrounding of overhead utility lines is being pursued more frequently by cities and counties in Florida. Unless the local government owns the electric utility and can utilize utility revenues, there is generally not a dedicated revenue source available to fund these efforts, but many local governments utilize a combination of special or non-ad valorem assessments and general obligation debt to finance these improvements. Both of these revenue sources will be discussed below.

[1] The City may have debt capacity within its existing revenue sources and should consult with its financial advisor.

Non-Ad Valorem or Special Assessments

Non-ad valorem or special assessments are one potentially available revenue source to fund utility underground improvements. A non-ad valorem or special assessment is a charge imposed against a particular property because that property receives a special benefit from the improvement or service to be funded. The greatest challenge in imposing a valid special assessment is to avoid classification as a tax. Under the Florida Constitution, no tax, other than ad valorem taxes, may be levied without general law authorization. However, counties and municipalities require no similar specific general authorization for special assessments. *See* City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992).

As established by case law, two requirements exist for the imposition of a valid special assessment: (1) the property assessed must derive a special benefit from the improvement or service provided and (2) the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit. See City of Boca Raton v. State, 595 So. 2d at 29. If a special assessment ordinance withstands the special benefit and fair apportionment tests, the assessment is not a tax and the judicial focus is then on whether the methods prescribed by the home rule ordinance were substantially followed. *See* Madison County v. Foxx, 636 So. 2d 39 (Fla. 1st DCA 1994). An assessment may provide funding for either capital expenditures or the operational costs of services, provided that the property which is subject to the assessment derives a special benefit from the improvement or service. *See* Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180 (Fla. 1995).

Although many assessed services and improvements have been upheld as providing the requisite special benefit to support a valid special assessment, there are not yet any reported decisions upholding a stand-alone utility undergrounding improvement project. However, there are at least two circuit court bond validations upholding such special assessments. *See* Town of Longboat Key v. Florida, No. 2016-CA-222 NC (Cir. Ct. of the 12th Judicial Cir. March 29, 2016); Town of Gulf Stream v. Florida, No. 50 2011 CA010894 (Cir. Ct. of the 15th Judicial Cir. Nov. 29, 2011). Additionally, the Town of Palm Beach recently imposed a non-ad valorem assessment to underground all local distribution utility lines on the island. This program is currently being challenged and in the discovery phase in circuit court.

If the City decides to pursue a special assessment program to fund all or a portion of the utility undergrounding project, the first step would be to coordinate with all of the city's utility providers and design professionals to outline the project specifications and costs. Next the City would engage a consultant to identify the special benefit, quantify the assessable costs,[2] and recommend a fair and reasonable apportionment method. Existing programs have identified special benefits related to aesthetics, safety, and utility reliability.

[2] Depending on the type of facilities, all of the costs may not be eligible for special assessment funding. For example, major distribution lines would likely provide a benefit to areas outside of the city and preclude 100% funding

Existing methods of apportionment have considered property factors such as size, use, and value. After the program costs and apportionment have been developed, the City would utilize the procedures in its existing code for imposition of special assessments. In the event the City wants to impose this program in 2018, it would need to include these improvements within a resolution of intent to be advertised (once per week for the four consecutive weeks immediately preceding the hearing) and adopted prior to January 1, 2018.

General Obligation Bonds

Referendum approved general obligation bonds are another potential revenue source to fund the costs of a utility undergrounding improvement project. Article Vll, section 9(b), Florida Constitution, provides as follows:

> Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; for all school purposes, ten mills; . . . and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

As it pertains to the City, these constitutional millage limitations can be summarized as follows:

- Ten mills for municipal purposes.
- The ten mills for municipal purposes may be exceeded if approved by electors: (1) for two years for general governmental purposes and (2) for payment of bonds.

Similarly, Section 200.081, Florida Statutes, provides statutory millage limitations for municipalities, "No municipality shall levy ad valorem taxes against real property and tangible personal property in excess of 10 mills, except for voted levies." As indicated above and provided in Article VII, section 12, Florida Constitution, any general obligation must be approved by vote of the electors who are owners of freeholds within the City that are not wholly exempt from ad valorem taxes.[3]

[3] Article Vll, section 12, Florida Constitution, requires the electors in bond referenda to be the owners of freeholds. Limiting the eligible electors to title holders of property has been the subject of state and federal litigation. The United States Supreme Court has invalidated elections restricted to freeholders under certain

In the event the City determines to issue a general obligation bond, it should consult with its financial advisor and bond counsel for proper implementation. We are available to assist as bond counsel if desired by the City.

This memo is intended to provide a high level overview of potential project funding sources. Please let me know if you have additional questions or require more detailed follow-up.

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circumstances, pursuant to the equal protection clause of the Fourteenth Amendment. See Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969). The Florida Supreme Court has distinguished Kramer and Cipriano and ruled that freeholder elections are valid where the landowners interests are more substantial than that of non-property owners. See State v. Frontier Acres Community Dev. Dist. Pasco County, 472 So. 2d 455 (Fla. 1985).