Loan secured by municipal property, referenda

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Mr. Jorge R. Delgado
Attorney for the City of Lauderdale Lakes
200 East Law Olas Boulevard
Suite 1700
Fort Lauderdale, Florida 33301

Dear Mr. Delgado:

You have asked for this office's assistance in determining whether the City of Lauderdale Lakes may borrow monies secured by real property owned by the city without referendum approval.

In sum, it would appear that a city may not borrow monies secured by city-owned property for a term in excess of 12 months without referendum approval as required by section 12, Article VII of the Florida Constitution.

A municipality is authorized to borrow money and to issue certificates of indebtedness to finance any capital or other project permitted by the State Constitution and to pledge the funds, credit, property, and taxing power of the municipality for the payment of such debts.[1] The exercise of this power, however, is constitutionally limited by sections 10 and 12, Article VII of Florida's Constitution. Section 10 of Article VII generally prohibits the pledging of municipal credit or the use of a municipality's taxing power for other than municipal purposes.[2] Section 12 of Article VII provides that a municipality may issue bonds, certificates of indebtedness, or any form of tax anticipation certificates payable from ad valorem taxation and maturing more than 12 months after issuance only "to finance or refinance capital projects authorized by law and only when approved by vote of the electors[.]"[3]

The Florida Constitution does not require elector approval when certificates of indebtedness, revenue bonds, or security interests are payable solely from sources other than ad valorem taxes and do not otherwise pledge the governmental entity's taxing credit.[4] Thus, if the city borrows money for any valid municipal reason and repays that money solely from any source other than ad valorem tax revenues, no approving election or referendum is required.

In contrast to such an unsecured obligation of a governmental entity, the creation of a security interest in real or personal property with a right of foreclosure requires a referendum. In Attorney General Opinion 80-09, this office concluded that a municipality was not authorized to finance the purchase of a computer under a 24–60 month lease-purchase agreement granting a security interest in the equipment with an accompanying right of foreclosure or other remedy to enforce the performance of the city's obligation. The agreement considered in that opinion authorized the lessor to repossess and sell the equipment upon the default of the city, and this office determined that a "security interest" had been created in the equipment. The opinion discussed that security interest could result in the city being coerced into levying ad valorem taxes to avoid

loss of the equipment, leading to the conclusion that such a contractual financing arrangement constituted an indirect pledge of the city's ad valorem taxing power requiring approval by the electors of the city pursuant to section 12, Article VII, Florida Constitution.[5]

This office and Florida courts have consistently found that absent referendum approval, the creation of a security interest with the right of foreclosure or recovery in the event of default in an installment purchase of equipment or real property by a county or municipality in excess of 12 months violates section 12, Article VII of the Florida Constitution.[6] While a municipality generally may borrow money to finance an undertaking for a municipal purpose, borrowing for a term in excess of 12 months on a loan that creates a security interest, such as using a municipal building as collateral, requires referendum approval.

Based upon the preceding discussion, it would appear that the City of Lauderdale Lakes may not use a municipal building as security for borrowing funds for a period in excess of 12 months absent referendum approval.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Section 166.111, Fla. Stat.

[2] *Cf. Bannon v. Port of Palm Beach Dist.*, 246 So. 2d 737 (Fla. 1971).

[3] *See* s. 166.121, Fla. Stat., recognizing that bonds issued pursuant to Part II, Ch. 166, Fla. Stat., "shall be authorized by resolution or ordinance of the governing body and, if required by the State Constitution, by affirmative vote of the electors of the municipality[;]" *State v. County of Dade*, 234 So. 2d 651 (Fla. 1970).

[4] *See State v. Board of Public Instruction, Okaloosa County*, 214 So. 2d 723 (Fla. 1968); *State v. Orange County*, 281 So. 2d 310 (Fla. 1973), in which the court upheld the issuance of capital improvement bonds without an election to finance the acquisition and construction of the county's share of racetrack and jai alai funds; *Orange County Civic Facilities Authority v. State*, 286 So. 2d 193 (Fla. 1973), holding that, with the sole exception of ad valorem tax revenues, any revenues of a county could be pledged for the retirement of the proposed civil facilities revenue bond issue.

[5] *And see* Ops. Att'y Gen. Fla. 76-121 (1976) and 73-164 (1973) (deferred payment plan created a conditional indebtedness on the part of the local governmental entity in the nature of a legal liability for a capital venture predicated upon the general credit; the plan placed the local governmental entity in a position of being coerced into levying a tax in order to prevent the loss of the property by foreclosure and was not permissible without an approving referendum).

[6] *See State v. County of Dade*, 234 So. 2d 651 (Fla. 1970); *Nohr v. Brevard County Educational Facilities Authority*, 247 So. 2d 304 (Fla. 1971) (possibility of the district's moral obligation to levy taxes or appropriate funds brought that bond issuance within the purview of s. 12, Art. VII, State Const.); Ops. Att'y Gen. Fla. 98-71 (1998) (fire control district may not grant a security interest in real or personal property for a period in excess of 12 months which includes the right of foreclosure in the event of the district's default as such an agreement would violate Art. VII, s. 12, Fla. Const.) and 80-09 (1980) (city may not finance purchase of computer and financing arrangement granting security interest in the equipment, with a right of foreclosure without referendum approval).