Agenda Item No. 9D

City Council Meeting of: 4.23.2012

REVISED

City Manager Department
201 Westward Drive
Miami Springs FL 33166
305-805-5010

TO: Honorable Mayor Garcia and Members of the City Council

FROM: Ron Gorland, City Manager

DATE: April 23, 2012

RECOMMENDATION: For Council to Approve the Main Street America Group Term Sheet as a Replacement for the Previously Approved FTL Term Sheet Regarding the $738,320 Curtiss Mansion National Historic Tax Credit Investment Transaction

DISCUSSION:

FTL, the original Council approved investor, when approached regarding possible improvements to their term sheet, decided to no longer participate in the proposed transaction. A replacement investor, NGM Insurance Co., stepped in to replace FTL, in the transaction as originally agreed to by FTL (term sheet attached).

In addition to, but not part of the term sheet, is the possibility that one or more of the following may be needed to close the transaction:

- A commitment that the net proceeds from this transaction will be used toward completion of the Curtiss Mansion parking lot, and may require that the funds be placed in a separate bank account
- A commitment that the City will do whatever is necessary to obtain a Temporary Certificate of Occupancy within a specified period (ex. 2 years); and a Certificate of Occupancy within a specified period (ex. 4 years)
- A commitment that the City will cover any shortfalls required to obtain a Certificate of Occupancy
- Resolution of potential property and sales tax concerns (attachment "B")

Both Jan Seiden, City Attorney, and Robert Chaves, City tax attorney, have reviewed the attached term sheet.

Attachment "B"

MEMORANDUM

TO: Jan K. Seiden, Esq.

CC: Erik Wishneff, Esq.
Carl Desenberg, Esq.

FROM: Mitchell W. Goldberg, Esq.

RE: Florida Sales Tax

DATE: April 12, 2012

The City of Miami Springs ("City") (indirectly through two sub-LLCs) is currently contemplating whether to lease the premises to or enter into an operating agreement with Curtiss Mansion, Inc. ("CMI") with respect to the premises. As discussed in this memorandum, the arrangement should be a lease with CMI because it should minimize sales tax on the rental payments (assuming all procedural requirements are met, discussed in more detail below) and such lease should not be a "disqualified lease" for purposes of the federal historic tax credit to a tax-exempt entity (here, CMI) that would otherwise preclude use of the tax credit if none of the following exist:

A. Part or all of the premises was financed (directly or indirectly) by obligations the interest of which is exempt from federal income tax and CMI (or a related entity) participated in the financing;

B. There is a fixed or determinable price purchase or sale option (or the equivalent thereof) which involves CMI;

C. The lease has a lease term in excess of twenty (20) years; and

D. The lease occurs after the sale (or other transfer) of the premises by, or lease of the premises from, CMI (or a related entity) and the premises has been used by CMI (or a related entity) before the sale (or other transfer) or lease. This last provision effectively covers a sale lease-back situation.

For purposes of the immediately foregoing, a "related entity" means each governmental unit and each agency or instrumentality thereof, two nongovernmental units if there is significant common purposes and substantial common membership or substantial common direction or control, or an entity that is owned 50% or more by another entity. There is also an anti-abuse rule that will treat entities as related if they transact in an attempt to avoid the disqualified lease rules. Here, provided CMI is not an instrumentality of City, has no commonality of membership or control between it and City, and it is not owned more than 50% by City, City and CMI should not be "related entities." Thus, since CMI did not participate in tax-exempt financing of the premises, there will be no purchase price or sale option in the proposed lease, the lease to CMI will be for ten (10) years, and there is not a sale-leaseback of the premises by CMI (albeit a sale lease-back could be an issue if the City and CMI were related entities), the lease should not be a "disqualified lease" for purposes of the federal historic tax credit.

The State of Florida imposes a sales tax on the rental payments received from the lease of certain real property. Fla. Stat. § 212.031(2)(b) provides:

> It is the further intent of the [Florida] Legislature that only one tax be collected on the rental or license fee payable for the occupancy or use of any such property, that the tax so collected shall not be pyramided by a progression of transactions, and that the amount of the tax due the state [of Florida] shall not be decreased by any such progression of transactions.

Subsection (8) of Fla. Admin. Code Rule 12A-1.070 interprets the immediately foregoing statute and provides an alternative method by which sublessors may avoid the imposition of sales tax by taking a credit on a pro rata basis for the tax paid by the sublessor to the landlord on the premises subleased. Alternatively, Fla. Admin Code Rule 12A-1.038(1) provides for the tender of a resale certificate under conditions described in the rule. Fla. Admin. Code Rules 12A-1.039(1) and 12A-1.070(9) identify the sub-lease of real property as an appropriate use of a resale certificate only where substantially all of the property is leased.

Fla. Admin. Code Rule 12A-1.039(1) exempts a sale for resale from the sales tax imposed by Fla. Stat. § 212. The lease or rental of real property to an active registered dealer when such property will subsequently be leased, rented, or licensed by the dealer's tenants is exempt from sales tax. For these purposes, an "active registered dealer" means a person who is registered with the Florida Department of Revenue ("DOR") as a dealer for sales tax purposes.

Fla. Stat. § 212.08(7)(p) exempts entities which are exempt from federal income tax pursuant to Internal Revenue Code § 501(c)(3), provided such exempt entity has obtained a sales tax exemption certificate from the DOR. This statute is interpreted by Fla. Admin. Code Rule 12A-1.038(3) which requires tax exempt entities (other than governmental units) to have a valid Consumer's Certificate of Exemption from the DOR, Form DR-14. Form DR-14 must be provided to the dealer (discussed below) to rent taxable property in lieu of paying sales tax, provided such property is used in furtherance of the entity's tax-authorized purposes and rental payments are made with the entity's own funds.

Here, because the ultimate lessee of the premises, CMI, is a tax exempt entity, the credits described in Fla. Admin. Code Rule 12A-1.070(8) would not provide any benefit since there will be no sales taxes paid by CMI to use as a credit. However, the resale certificate method in Fla. Admin. Code Rule 12A-1.070(9), and as further set forth in Fla. Admin Code Rules 12A-1.038(1) and 12A-1.039(1), can apply to avoid imposition of sales tax on the rental payments. To comply with Fla. Admin. Code Rule 12A-1.070(9), both Miami Springs Landlord, LLC ("Landlord") and Miami Springs Master Tenant, LLC ("Master Tenant") should register as dealers with the DOR. Master Tenant and Landlord should extend resale certificates. CMI should apply to the DOR for a Consumer's Certificate of Exemption and provide same.

Please note, however, that Fla. Stat. § 212.031(2)(b) bars both the pyramiding and the decreasing of the tax as a result of the progression of real property transactions. The DOR appears to interpret this provision to mean that the annual rental amounts of the subleases and sub-subleases must be equal to or greater than the primary lease. In light of the foregoing, if the average annual payments by each of CMI and Master Tenant are equal to or greater than the average annual payments by Landlord, and all other procedural requirements are satisfied, it may avoid the imposition of any sales tax.

However, the fact CMI is a tax exempt entity may result in a decrease in tax. We contacted the Florida Department of Revenue ("DOR") by telephone to request informal, nonbinding advice regarding whether the fact CMI is a tax exempt entity would per se result in a decrease of tax. In Technical Assistance Advisements ("TAAs") 89A-031 and 98(A)-042, the ultimate lessee was a tax exempt entity (a county and the U.S. Coast Guard, respectively) but in neither TAA did it take the next step and address whether each

entity's tax exempt status result in a decrease of tax. The representative from DOR advised us that DOR has never been asked to take that next step and thus has never issued an opinion, whether binding or nonbinding, on it. The representative informally advised us that he believed, if the ultimate lessee is tax exempt and the intermediary sub-leases substantially all the premises and both comply with all procedural requirements, it should not result in any sales tax. Provided, however, the representative further advised us that a good argument could be made that the ultimate lessee's tax exempt status results in a decrease of tax. In sum, he said that the foregoing is a "hot topic" at the DOR and there has been a lot of internal discussion at DOR about it. He recommended that a letter of technical advice ("LTA") be submitted addressing the issue, as one has never been submitted before. An LTA is a nonbinding, anonymous (i.e. taxpayer does not have to be disclosed) letter requesting DOR to address a specific situation. While an LTA officially is not an opinion of the DOR but rather of the author, the representative we spoke with advised us that such a request would go all the way up the chain of command such that the top officials within the DOR would have to sign off before its issuance.

Pursuant to the provisions of Internal Revenue Service Circular 230 that apply to written advice provided by Federal tax practitioners, please be advised (a) that if any advice herein relating to a Federal tax issue would, but for this disclaimer, constitute a "reliance opinion" within the meaning of Circular 230, such advice is not intended or written to be used, and cannot be used by the affected taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer, and (b) any written statement contained herein relating to any Federal tax issue may not be used by any person to support the promotion or marketing of, or to recommend, any Federal tax transaction(s) or matter(s) addressed herein. We would be happy to discuss the effect of this disclaimer, and alternatives to this disclaimer, with you if desired.

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Select Year: 2011 Go

The 2011 Florida Statutes

Title XIV
TAXATION AND FINANCE

Chapter 196
EXEMPTION

View Entire Chapter

196.1997 Ad valorem tax exemptions for historic properties.–

(1) The board of county commissioners of any county or the governing authority of any municipality may adopt an ordinance to allow ad valorem tax exemptions under s. 3, Art. VII of the State Constitution to historic properties if the owners are engaging in the restoration, rehabilitation, or renovation of such properties in accordance with guidelines established in this section.

(2) The board of county commissioners or the governing authority of the municipality by ordinance may authorize the exemption from ad valorem taxation of up to 100 percent of the assessed value of all improvements to historic properties which result from the restoration, renovation, or rehabilitation of such properties. The exemption applies only to improvements to real property. In order for the property to qualify for the exemption, any such improvements must be made on or after the day the ordinance authorizing ad valorem tax exemption for historic properties is adopted.

(3) The ordinance shall designate the type and location of historic property for which exemptions may be granted, which may include any property meeting the provisions of subsection (11), which property may be further required to be located within a particular geographic area or areas of the county or municipality.

(4) The ordinance must specify that such exemptions shall apply only to taxes levied by the unit of government granting the exemption. The exemptions do not apply, however, to taxes levied for the payment of bonds or to taxes authorized by a vote of the electors pursuant to s. 9(b) or s. 12, Art. VII of the State Constitution.

(5) The ordinance must specify that any exemption granted remains in effect for up to 10 years with respect to any particular property, regardless of any change in the authority of the county or municipality to grant such exemptions or any change in ownership of the property. In order to retain the exemption, however, the historic character of the property, and improvements which qualified the property for an exemption, must be maintained over the period for which the exemption is granted.

(6) The ordinance shall designate either a local historic preservation office or the Division of Historical Resources of the Department of State to review applications for exemptions. The local historic preservation office or the division, whichever is applicable, must recommend that the board of county commissioners or the governing authority of the municipality grant or deny the exemption. Such reviews must be conducted in accordance with rules adopted by the Department of State. The recommendation, and the reasons therefor, must be provided to the applicant and to the governing entity before consideration of the application at an official meeting of the governing entity. For the purposes of this section, local historic preservation offices must be approved and certified by the Department of State.

(7) To qualify for an exemption, the property owner must enter into a covenant or agreement with the governing body for the term for which the exemption is granted. The form of the covenant or agreement must be established by the Department of State and must require that the character of the

property, and the qualifying improvements to the property, be maintained during the period that the exemption is granted. The covenant or agreement shall be binding on the current property owner, transferees, and their heirs, successors, or assigns. Violation of the covenant or agreement results in the property owner being subject to the payment of the differences between the total amount of taxes which would have been due in March in each of the previous years in which the covenant or agreement was in effect had the property not received the exemption and the total amount of taxes actually paid in those years, plus interest on the difference calculated as provided in s. 212.12(3).

(8) Any person, firm, or corporation that desires an ad valorem tax exemption for the improvement of a historic property must, in the year the exemption is desired to take effect, file with the board of county commissioners or the governing authority of the municipality a written application on a form prescribed by the Department of State. The application must include the following information:

(a) The name of the property owner and the location of the historic property.

(b) A description of the improvements to real property for which an exemption is requested and the date of commencement of construction of such improvements.

(c) Proof, to the satisfaction of the designated local historic preservation office or the Division of Historical Resources, whichever is applicable, that the property that is to be rehabilitated or renovated is a historic property under this section.

(d) Proof, to the satisfaction of the designated local historic preservation office or the Division of Historical Resources, whichever is applicable, that the improvements to the property will be consistent with the United States Secretary of Interior's Standards for Rehabilitation and will be made in accordance with guidelines developed by the Department of State.

(e) Other information deemed necessary by the Department of State.

(9) The board of county commissioners or the governing authority of the municipality shall deliver a copy of each application for a historic preservation ad valorem tax exemption to the property appraiser of the county. Upon certification of the assessment roll, or recertification, if applicable, pursuant to s. 193.122, for each fiscal year during which the ordinance is in effect, the property appraiser shall report the following information to the local governing body:

(a) The total taxable value of all property within the county or municipality for the current fiscal year.

(b) The total exempted value of all property in the county or municipality which has been approved to receive historic preservation ad valorem tax exemption for the current fiscal year.

(10) A majority vote of the board of county commissioners of the county or of the governing authority of the municipality shall be required to approve a written application for exemption. Such exemption shall take effect on the January 1 following substantial completion of the improvement. The board of county commissioners or the governing authority of a municipality shall include the following in the resolution or ordinance approving the written application for exemption:

(a) The name of the owner and the address of the historic property for which the exemption is granted.

(b) The period of time for which the exemption will remain in effect and the expiration date of the exemption.

(c) A finding that the historic property meets the requirements of this section.

(11) Property is qualified for an exemption under this section if:

(a) At the time the exemption is granted, the property:

1. Is individually listed in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966, as amended; or

2. Is a contributing property to a national-register-listed district; or

3. Is designated as a historic property, or as a contributing property to a historic district, under the terms of a local preservation ordinance; and

(b) The local historic preservation office or the Division of Historical Resources, whichever is applicable, has certified to the local governing authority that the property for which an exemption is requested satisfies paragraph (a).

(12) In order for an improvement to a historic property to qualify the property for an exemption, the improvement must:

(a) Be consistent with the United States Secretary of Interior's Standards for Rehabilitation.

(b) Be determined by the Division of Historical Resources or the local historic preservation office, whichever is applicable, to meet criteria established in rules adopted by the Department of State.

(13) The Department of State shall adopt rules as provided in chapter 120 for the implementation of this section. These rules must specify the criteria for determining whether a property is eligible for exemption; guidelines to determine improvements to historic properties which qualify the property for an exemption; criteria for the review of applications for exemptions; procedures for the cancellation of exemptions for violations to the agreement required by subsection (7); the manner in which local historic preservation offices may be certified as qualified to review applications; and other requirements necessary to implement this section.

History.—s. 1, ch. 92-159.

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The 2011 Florida Statutes

Title XIV
TAXATION AND FINANCE

Chapter 196
EXEMPTION

View Entire Chapter

196.1998 Additional ad valorem tax exemptions for historic properties open to the public.—

(1) If an improvement qualifies a historic property for an exemption under s. 196.1997, and the property is used for nonprofit or governmental purposes and is regularly and frequently open for the public's visitation, use, and benefit, the board of county commissioners or the governing authority of the municipality by ordinance may authorize the exemption from ad valorem taxation of up to 100 percent of the assessed value of the property, as improved, any provision of s. 196.1997(2) to the contrary notwithstanding, if all other provisions of that section are complied with; provided, however, that the assessed value of the improvement must be equal to at least 50 percent of the total assessed value of the property as improved. The exemption applies only to real property to which improvements are made by or for the use of the existing owner. In order for the property to qualify for the exemption provided in this section, any such improvements must be made on or after the day the ordinance granting the exemption is adopted. (2)

(2) In addition to meeting the criteria established in rules adopted by the Department of State under s. 196.1997, a historic property is qualified for an exemption under this section if the Division of Historical Resources, or the local historic preservation office, whichever is applicable, determines that the property meets the criteria established in rules adopted by the Department of State under this section.

(3) In addition to the authority granted to the Department of State to adopt rules under s. 196.1997, the Department of State shall adopt rules as provided in chapter 120 for the implementation of this section, which shall include criteria for determining whether a property is qualified for the exemption authorized by this section, and other rules necessary to implement this section.

History.—s. 2, ch. 92-159.

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Title XIV
TAXATION AND FINANCE

Chapter 196
EXEMPTION

View Entire Chapter

196.1961 Exemption for historic property used for certain commercial or nonprofit purposes.—

(3)

(1) Pursuant to s. 3, Art. VII of the State Constitution, the board of county commissioners of any county or the governing authority of any municipality may adopt an ordinance to allow an ad valorem tax exemption of up to 50 percent of the assessed value of property which meets all of the following criteria:

(a) The property must be used for commercial purposes or used by a not-for-profit organization under s. 501(c)(3) or (6) of the Internal Revenue Code of 1986.

(b) The property must be listed in the National Register of Historic Places, as defined in s. 267.021; or must be a contributing property to a National Register Historic District; or must be designated as a historic property or as a contributing property to a historic district, under the terms of a local preservation ordinance.

(c) The property must be regularly open to the public.

(2) As used in this section, "regularly open to the public" means that there are regular hours when the public may visit to observe the historically significant aspects of the building. This means a minimum of 40 hours per week, for 45 weeks per year, or an equivalent of 1,800 hours per year. A fee may be charged to the public; however, it must be comparable with other entrance fees in the immediate geographic locale.

(3) The board of county commissioners or municipal governing authority shall notify the property appraiser of the adoption of such ordinance no later than December 1 of the year prior to the year the exemption will take effect. If the exemption is granted only for a specified period or the ordinance is repealed, the board of county commissioners or municipal governing authority shall notify the property appraiser no later than December 1 of the year prior to the year the exemption expires. The ordinance must specify that the exemption shall apply only to taxes levied by the unit of government granting the exemption. The exemption does not apply, however, to taxes levied for the payment of bonds or to taxes authorized by a vote of the electors pursuant to s. 9(b) or s. 12, Art. VII of the State Constitution.

(4) Only those portions of the property used predominantly for the purposes specified in paragraph (1)(a) shall be exempt. In no event shall an incidental use of property qualify such property for an exemption or impair the exemption of an otherwise exempt property.

(5) In order to retain the exemption, the historic character of the property must be maintained in good repair and condition to the extent necessary to preserve the historic value and significance of the property.

History.—s. 8, ch. 97-117.