

**VOLUSIA COUNTY
INDUSTRIAL DEVELOPMENT AUTHORITY**

February 14, 2019
Dennis McGee Room, Daytona Beach International Airport
Daytona Beach, Florida

A duly advertised continued public hearing of the Volusia County Industrial Development Authority was called to order at 10:03 a.m. by Chairman Dennis Stark.

Other members present:

Rick Dawson	Jim Smith (arrived 10:08 a.m.)
Kent Sharples	

Others in attendance:

Mark Hall, Mark R. Hall, P.A., IDA Bond Counsel
Chauncey Lever, Bond Counsel, Foley & Lardner
Elizabeth Murphy, Assistant County Attorney
Rob Ehrhardt, Director, Volusia County Economic Development
Sally Sprague, Recording Secretary, Volusia County Economic Development

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At this time, attendees announced their name for the record. Attendees are:

Mike Woods	Dennis Devenport	Russ Meinert	Donald Gordon
Janice Cornelius	Colleen Rerko	Rick Dawson	
Dennis Stark	Kent Sharples	Mark Hall	Chauncey Lever
Elizabeth Murphy	Bill Thompson	Virgil Kimball	
Noah McKinnon	Randy Hayes	Scott McKee	Ann-Margaret Emery
Joyce Shanahan			

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III. Approval of January 23, 2019 Minutes. Chairman Stark said since this meeting is a continuation of a previous meeting, he would forego reading of the minutes at this time.

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IV. Summary of Thompson Pump agreement with United Rental – Appearing before the Authority was Mr. Bill Thompson who said they are starting their 50th year in the business. Property was purchased in Port Orange in order to expand their operations. (2017 bond request) Soon thereafter they received inquiries to buy the business. The rental side of the business was

sold to United Rental. United has hired all their rental employees and his son, Chris who was president of Thompson, has to work for them for one year. Mr. Thompson said the company has experienced tremendous growth the last several years and do intend to relocate to the new property but not sure how much space is needed at the current time with the recent sell.

It was noted that the Application for Bond Issuance of 2017 is grandfathered-in and will be considered to its natural end.

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For the record, member Jim Smith arrived.

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V. Continued Public Hearing re: Antares of Ormond Beach

Appearing before the Authority was Mike Woods, attorney, representing Antares LLC in the TEFRA request.

At this time, Mark Hall read the title only of the Authority's Resolution:

RESOLUTION NO. 2019- 001

A RESOLUTION OF THE VOLUSIA COUNTY INDUSTRIAL DEVELOPMENT AUTHORITY RELATING TO THE PROPOSED ISSUANCE BY THE CAPITAL TRUST AGENCY OF ITS SENIOR LIVING REVENUE BONDS (ANTARES OF ORMOND BEACH PROJECT), IN ONE OR MORE SERIES, PURSUANT TO A PLAN OF FINANCE IN AN AGGREGATE PRINCIPAL AMOUNT NOT TO EXCEED \$35,000,000 AND RECOMMENDING THAT THE COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, APPROVE THE ISSUANCE OF SUCH BONDS SOLELY FOR PURPOSES OF SECTION 147(f) OF THE INTERNAL REVENUE CODE; AND PROVIDING AN EFFECTIVE DATE.

He pointed out that Mr. Dawson has filed a conflict of interest form but can participate in discussions. There are three members eligible to vote.

Mike Woods was present and said he's requesting the authority recommend to the County Council approval of the TEFRA application of bonds issued by CTA. Previously the City of Ormond Beach had asked for a PILOT (payment in lieu of taxes) agreement as a condition of approval, an agreement that if a for profit decides later to change to a non-profit, monies will be paid, and said the IDA doesn't have the authority to require that, nor is there a policy in place to require same, and not necessary at this point. He noted as it was continued there was a question of indemnity and that they are trying to finalize the language per questions raised by the County Attorney's office. His response to the county was distributed to the members and the attending public. For twenty years and over \$2 billion in bond issuances, there's has never been any litigation challenging any part to the TEFRA process. CTA has not been challenged. The applicant is willing to increase of \$100,000 for possible litigation costs related to defending the county or the IDA for their participation in the TEFRA process. As far as duration of ownership, Mr. Woods said the loan agreement would provide that a majority or a super majority of bondholders would be required to approve any subsequent purchases in advance. The restrictions on subsequent purchasers has been addressed and minimum denominations, the applicant is willing to increase

the minimum to \$100,000. Mr. Woods' email date 2/8/2019 is attached to the minutes for reference.

Appearing on behalf of the City of Ormond Beach was Mr. Randy Hayes, City Attorney, noting that Ormond has a number of concerns. Although they support the project and a development order has been issued, there is a potential of long term revenue loss. Antares had come to Ormond as the host to approve the TEFRA and that it would pay \$3.4 million in ad valorem taxes over the next 10 years. To ensure that the promise was fulfilled, the city asked the applicant to agree to enter into a PILOT agreement so that in the event it was sold to, merged into or converted into a not for profit organization, the promise of ad valorem payments would not go unfilled. It was found there was an issue with the company' financial health and in order to protect the taxpayers, when or if, a PILOT was deemed necessary.

The City of Ormond Beach's formal request that the public hearing currently scheduled be canceled, postponed, or continued to a new date, time, location, and facility that fully complies with the open public meeting requirements of the Florida Constitution and the Florida sunshine law. Further be advised that the city is asserting that it is the local governing authority that has primary jurisdiction over the project and the project site; and in the alternative without waiving the claim to having primary jurisdiction, the city would assert, at a minimum, that it has concurrent jurisdiction with the county. As such, Ormond Beach would request that the IDA defer taking any action on the merits of the application and that the matter be referred back to the city. The city has primary overview of the property, to levy taxes for schools, fire, police, etc. Mr. Hayes recommended if the authority saw fit to approve, make the PILOT a condition should it revert to a non-profit status. There would be a potential loss of approximately \$4 million in taxes should it revert. Mr. Hayes stated that the applicant refused to enter into a PILOT so they came to the county.

Mr. Hayes email dated 2/13/2019 to Ms. Murphy and Mr. Hall is attached to the minutes for reference.

Ms. Joyce Shanahan, City Manager for Ormond Beach, spoke to the authority regarding the tax exempt savings over a period of 20 years. She noted that the city has their own EMS and EVAC is secondary, so there will be an impact as a senior living facility.

Appearing before the Authority was Mr. Noah McKinnon of Ormond Beach, attorney. He said there exists a legitimate legal issue regarding the public hearing forum for this matter. Specifically, having the meeting at the airport and that the location may violate the open public meeting requirements of the Florida Constitution and the Florida sunshine law particularly in light of the fact that any member of the general public who wishes to attend the public hearing will be required to pay to park their vehicle in either the short or long term parking lots as a condition to accessing the meeting facility. Most residents who are familiar with the airport understand that in order to access the airport, one must pay to park their vehicle in the airport parking lot. The paid-parking requirement may well serve as an impediment to, or have a chilling effect upon, the ability of members of the general public who desire to attend the public hearing but are either reluctant or refuse to pay to park in order to do so. Additionally, the parking issue is further compounded by the fact that the public hearing has been scheduled during the Daytona 500 Speed Week. The NASCAR racetrack is situated very near and adjacent to the airport and pedestrian and vehicular traffic is very congested. Many residents avoid the area entirely due to the intense congestion. The

race events may well serve as an additional impediment to the ability of the general public to access the airport facility and attend the public hearing.

Mr. McKinnon quoted FS 286.011(6): "All persons subject to subsection (1) are prohibited from holding meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict public access to such a facility." He therefore asked the Authority to continue the hearing in Ormond Beach or closer to Ormond where there aren't parking issues or near the speedway. The citizens who wish to speak on this matter could attend without paying parking fees at a location other than the airport.

Mr. Hall thought the claim of location/parking was weak but would be a decision the Authority can do, continue, move the location, advertise free parking, etc. His opinion is that this venue is acceptable and is a practice of the Economic Development office and the IDA to provide parking passes for attendees but if you're picking someone up at the airport you have to pay for parking. He felt the claim was invalid.

With regard to the sunshine comment, Mr. Sharples questioned the past decision and future bond issues such as Thompson Pump. And what of projects going forward. He also questioned the PILOT agreements, a broader issue and implications and didn't think the Authority had any business in the concept of PILOT agreements. Mr. Sharples referred to E. Murphy's email and the positions taken.

Much discussion was held concerning violations of the Sunshine law.

The IDA acts on behalf of the County and would have to delegate it to the host city to be heard by Ormond. Concern was raised with regard to the continued question of the current venue, and can be discussed at a later date.

At this time, Elizabeth Murphy quoted from her memorandum to the Authority, the following:

Applicant certified on December 6, 2018, that it had received, reviewed and agreed to comply with the Guide to IDR Bond Financing, including Section 10 (i), "History of Financial Performance," which requires 3 years of audited financial statements for Applicant, "third party guarantors and other parties from which revenues to repay the debt are dependent." Section 10 (i) continues to provide that Applicants in business for less than three years must also submit pro forma projections "covering the three years following the commencement of operation of the project." Applicant has submitted no financial history and has declined county's request to provide a third party guarantor with its own financial history to stand behind Applicant's indemnities to county and the IDA. The requirement for three years of projections for new companies is in addition to (not in lieu of) a requirement of financial history, whether that history is from applicants or their guarantors. Concerns about public purpose and a PILOT agreement aside, the county attorney cannot recommend to the IDA or to the county council approval of a TEFRA application lacking either a financial history or a guarantor with a financial history.

Secondly, the county has a concern about substantial public benefit as required by the IRS. The applicant has stated that 20% of the beds being set aside are income restricted according to the media income in Volusia, however the applicant has indicated that the most affordable is

\$3,750 monthly depending on bedrooms, and how can it public benefit to anyone if they can't get into the facility with a salary less than \$19,000 - \$22,000/yr.

Another issue Ms. Murphy raised is denominations of the bonds. Bond guide requires not less than \$1M. The applicant has offered to return with \$100,000 denoms but that is not sufficient.

The project will pay an estimated \$3.4 million in local property taxes over the next 10 years and has been budgeted by the applicant but when asked how long the bond documents require applicant to hold the facility, the offer sent by applicant's counsel was 5 years.

Ms. Murphy said the county does believe the IDA has the authority to look at issues raised and also to consider a PILOT policy.

Mr. Hall stated that the memo Ms. Murphy referred to dated February 12, 2019 from her to the Industrial Development Authority should be part of the record.

After questioning by Mr. Smith, Mr. Hayes said they were not asking for delegation of authority but that the city was the most appropriate forum to address the project. Mr. Smith commented that with the question of the sunshine law and the PILOT, and the city could ask the County Council to delegate the TEFRA hearing to them, it would seem a lot of issues could be resolved with that type of an action. Additionally, what will trigger the agreement, and who is responsible to bring it forward and enforce. Mr. Hayes said it's a binding agreement on successors as a recordable public document. There are currently 14 assisted living facilities in Ormond Beach. The proposed use of land has an impact long and short term and the PILOT agreement is necessary and appropriate in this particular request. Although the city supports the project, the applicant did not agree with the previous conditions requested. The city is not opposed to the County Council delegating the request back to the city – the city needs to have a voice in this request.

Appearing before the Authority was Ms. Saralee Morrissey, Director, Planning & Construction for the Volusia County School District, who said she was advised by the city manager and city attorney of the concerns they have about the project, and how it impacts the ad valorem tax stream. She said we (?) would support a policy decision and recommendation from the IDA that a PILOT agreement be required should a conversion to non-for profit take place. Ms. Morrissey spoke of the amount of elderly citizens in their care during the hurricanes of 2016 and 2017 in that some schools are designated emergency shelters.

Ms. Murphy commented that a recent statutory change more favorable to tax exemption of ALFs. The Legislature revised the exemption definition statute (section 196.012) this past year to provide for the inclusion of facilities that possess "a valid license under chapter 400 or part I of chapter 429" (my emphasis), thereby including assisted living facilities under the type of property identified in section 196.197. Unlike Section 196.1975, which requires the ALF to meet income tests, Section 196.197 mandates that homes for special services "shall be exempt" if they are a Florida not for profit exempt as of January 1 of the year of application for exemption by having qualified as an exempt organization under the provisions of 501(c)(3) of the Internal Revenue Code.

Mr. Sharples commented that he understood Ormond Beach did not have a pilot policy and he understood the importance of the revenue stream but didn't believe the authority should be involved in PILOTS as there is no county or city policy. Main concern the PILOT has a potential to slow down economic development. Mr. Dawson asked for clarification of Ms. Murphy's

comments regarding rule change on not for profit financing and commercial financing. Ms. Murphy provided comment.

No other member of the general public spoke to this request.

In reference to Ms. Morrissey's presentation, Mr. Mike Woods asked to clarify for the record if it was the official policy of the Volusia County School Board to require a PILOT agreement and she said there are none. Also, has there been any formal action taken by the school board on this TEFRA request or any others, Ms. Morrissey said the board has been advised. He understands the concern of defending the tax base but did not agree this was right time or place to start imposing policy, and said his clients have no interest in continuing the hearing. He disagreed with the previous claim of sunshine violation because of venue and parking. From a public purpose standpoint, assisted living facilities serves a public purpose as defined in state statute. The IDA is not issuing the bonds. Under the TEFRA guidance from the federal register, to be considered the scope of what is to be heard, method and what is to be heard, and referred to the IRS conditions. He believed the request is acceptable. Mr. Sharples asked if development of this project would not happen if TEFRA request was continued. Mr. Woods said they went to the city and city asked for certain conditions, didn't agree to those conditions. Mr. Woods said he is trying to avoid any delay going to county council and felt his responses to the questions and concerns have been answered.

Chairman Stark closed the public meeting.

Mr. Sharples asked Mr. Hall was their motion options were and Mr. Hall responded that an option would be to continue the hearing and re-notice the application, at this location and define was free parking is. Option to approve resolution 2019-1 as presented with the condition of the PILOT agreement discussions take place between the applicant and county staff prior to making a recommendation to the county council. This is a TEFRA hearing to make sure the requirements of the act is met. There has been a full airing and didn't think the IDA had the authority to require the county or CTA to do anything as far as the PILOT agreement is concerned. Ms. Murphy added that the third option motion would be to deny based on the deficiencies that was discussed. Mr. Hall agreed there was a third option motion.

Mr. Smith referred to Ms. Murphy's memo of 2/12, top of page 4, last sentence, "Concerns about public purpose and a PILOT agreement aside, the county attorney cannot recommend to the IDA or to the county council approval of a TEFRA application lacking either a financial history or a guarantor with a financial history" and asked if that has changed since discussions today. Ms. Murphy said no. He therefore asked if the authority can move forward. Mr. Hall said his position was that county staff deal with that prior to county council hearing. The resolution is a merely a recommendation to approve the issuance of the bonds, although they're not approving the bonds. Although the authority can recommend approval subject to but only are making a recommendation. Mr. Sharples commented that it appeared the IDA doesn't have the authority with regards to PILOT agreements. Mr. Hall said there were two more hearings after this for county staff to work with the applicant to resolve issues, the county council hearing and the CTA hearing in Tallahassee.

After some discussion, Mr. Sharples made a motion to approve resolution 2019-01 as presented with two conditions, pilot agreement discussions take place between the applicant and county staff to develop a policy and recommend such to county council, and the applicant provide

appropriate financial statements, etc. to the satisfaction of county staff prior to it being sent to county council for consideration. Said motion was seconded by Mr. Smith and passed by unanimous voice vote. It was noted Mr. Dawson abstained from voting.

A recess was called.

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VI. Old Business

A. Recruitment of new members – Mr. Ehrhardt asked the members to keep in mind the vacancy and any recommendations are welcomed within the next couple of weeks would be appreciated.

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B. Update on IDA audit – Mr. Ehrhardt advised that after the Authority authorized the mandated audit, he met with representatives of JamesMoore (Mr. Chalifour of JMCO) who did not think it would be lengthy and should have the report back for review sometime in May.

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VII. New Business

A. Mr. Smith made a motion that for future meetings it be noticed the parking will be validated (free). Said motion was seconded by Mr. Dawson and passed by unanimous voice vote.

B. Mr. Ehrhardt said during the course of the meeting he heard that the current application procedure was ‘clunky and inartful’. Mr. Stark said it appears the application is towards the authority doing the funding and not so much a TEFRA, and possibly create an application for a TEFRA only. After some discussion, Mr. Hall said a completely different application should be created for a TEFRA. Mr. Stark so directed Mr. Ehrhardt.

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There being no further business meeting adjourned at 12:06 p.m.

This is a general overview of the meeting. The meeting was recorded.

Michael Woods

From: Michael Woods
Sent: Friday, February 08, 2019 4:57 PM
To: Elizabeth Murphy; 'Robert Ehrhardt'
Cc: Heather Flores
Subject: Antares of Ormond Beach, LLC

Elizabeth and Rob,

I hope this email finds you well. Sorry for the length of the email and time it took to get over to you, but we've been working very hard on our end to be as responsive as possible to the questions you have asked and the issues you have raised. I think you will find that, while we may not agree on every point, we have agreed to certain conditions that will alleviate any and all concerns raised by the County to date.

Indemnification and Guarantor Request:

While I've stated this before, I feel obligated to reiterate that with the request before the IDA and ultimately the County Council, neither Volusia County nor the IDA is being asked to issue or otherwise be responsible for the issue of the bonds in question. That duty is being fulfilled by an independent bond issuer, Capital Trust Agency ("CTA"). As we've worked to address the County's concern about liability related to its willingness to hold a local TEFRA hearing, I asked James Swan at Stifel to reach out to Ed Gray III (edgray3@muniad.com), executive director at CTA and Denis McKinnon III (dmckinnon@muniad.com), the financial analyst for CTA, regarding the history of litigation related to CTA's TEFRA bonds. Since 1999, CTA has issued a total par amount of \$2,623,960,805.00 through 61 different issuances. When we asked whether there has been any legal action against CTA by investors or other entities for issuing bonds, Mr. Gray's response was, "Never, our principal concern with any issuance of bonds is disclosure to investors and ongoing disclosures. No group or entity has ever initiated litigation against CTA. To the contrary, on 5 occasions over the existence of CTA, courts have validated the powers and authority of CTA to serve as a statewide and national issuer of bonds. The most recent validation was December of 2018. CTA has been routinely examined by regulatory agencies for determining if bond closings meet established regulatory statutes. There has never been an adverse determination following those examinations." We then asked whether there had ever been any legal action against the host jurisdiction who sign a TEFRA. Mr. Gray's response was, "Never. Neither CTA, its host city, Gulf Breeze, or any other governmental participant in a financing has ever been challenged for improper legal actions including approval of TEFRA resolutions." So for twenty years and over \$2 billion dollars in bond issuances, there has never been any litigation challenging any party to the TEFRA process. You may feel free to contact Mr. Gray and Mr. McKinnon directly to confirm these statements.

Given the absence of litigation related to a local entity's involvement with a TEFRA hearing, we believe that there is no basis for the County's insistence to require a guarantor for the indemnification provided to the County and the IDA board by the Applicant, particularly since Volusia County is not issuing the bonds. Moreover, we will not alter the Applicant's business structure by requiring members of the LLC to personally guarantee the indemnification. That request defeats the purpose of having a limited liability company. However, we do have some tools available to us through the issuance of the bond that should sufficiently protect the County's extremely limited exposure. As part of the loan agreement for the issuance of the bonds, a Working Capital Operating Reserve Fund will be funded with equity at closing in the amount of \$1.2 million dollars. This fund is there to cover an operating deficit of the Borrower, including any amounts payable to the County or the IDA which are due as a result of the Indemnity Agreements. We can and are willing to increase that fund to \$1.3 million dollars to provide an additional cushion of \$100,000 for possible litigation costs related to defending the County or the IDA for their participation in the TEFRA process. We can work on how best to document this, but would this address your concerns? It should be noted that this Working Capital

Operating Reserve Fund is separate and apart from other constrained funds like the Debt Service Reserve Fund and the Capitalized Interest. Capitalized Interest is set at \$4.8 million dollars and effectively eliminates the possibility of default.

Duration of Ownership:

During the discussion at the last IDA board meeting, a question was raised about how long the Applicant would be required to hold the property. Legally, the bonds are assumable by a subsequent purchaser and owner of the Project. While the final documents have not yet been drafted, it is the expectation of the Applicant that such a provision, allowing for the assumption of the bonds, would be included in the Loan Agreement. It is also our expectation that the Loan Agreement will provide that a majority or a super majority of bondholders will be required to approve any subsequent purchasers in advance. Is the County looking for a commitment by Antares to not sell to a non-profit for a certain number of years, say 5, or are you just trying to verify whether any such restriction already exists? We'd be willing to agree to the 5 year commitment.

Restrictions on Subsequent Purchasers:

We were able to verify that, with respect to transferability and resale, the following legend on the bonds will be included in the offering documents:

"THIS BOND IS SUBJECT TO RESTRICTIONS ON TRANSFERABILITY AND RESALE. THIS BOND MAY NOT BE REOFFERED, RESOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT TO A PERSON WHO IS A "QUALIFIED INSTITUTIONAL BUYER" UNDER RULE 144A UNDER THE SECURITIES ACT OR AN "ACCREDITED INVESTOR" UNDER REGULATION D UNDER THE SECURITIES ACT. EACH PURCHASER HEREOF AGREES TO PROVIDE ADVANCE WRITTEN NOTICE OF THE RESTRICTION ON TRANSFERS TO ANY PROPOSED TRANSFEREE OF A BENEFICIAL OWNERSHIP INTEREST IN THE PURCHASED BOND.

BY ITS PURCHASE OF THIS BOND, EACH TRANSFEREE REPRESENTS SHALL BE DEEMED TO HAVE CERTIFIED THAT SUCH TRANSFEREE IS A "QUALIFIED INSTITUTIONAL BUYER" UNDER RULE 144A UNDER THE SECURITIES ACT, OR AN "ACCREDITED INVESTOR" UNDER REGULATION D PROMULGATED PURSUANT TO THE SECURITIES ACT AND REPRESENTS THAT SUCH TRANSFEREE WILL ONLY TRANSFER, RESELL, REOFFER, PLEDGE OR OTHERWISE TRANSFER THIS BOND TO A SUBSEQUENT TRANSFEREE WHO IS A "QUALIFIED INSTITUTIONAL BUYER" UNDER RULE 144A UNDER THE SECURITIES ACT, OR AN "ACCREDITED INVESTOR" UNDER REGULATION D UNDER THE SECURITIES ACT."

This language should address your concerns regarding the possible nature of who would purchase the bonds and their level of sophistication.

Minimum Denominations:

In response to concerns raised about the denomination of the bonds, we are willing to increase the minimum from \$25,000 to \$100,000.

I hope that these proposed solutions will address the concern County Legal has raised with respect to the TEFRA hearing. I'll be available all day Monday to discuss and finalize language, assuming the proposed resolution above are acceptable.

Thanks,
Mike

2

From: "Hayes, Randy" <Randy.Hayes@ormondbeach.org>
To: 'Elizabeth Murphy' <emurphy@volusia.org>, Mark <mark@mhalla.com>
CC: Charles Hargrove <CHargrove@volusia.org>, Robert Ehrhardt <REhrhardt@vol...>
Date: 2/13/2019 4:58 PM
Subject: RE: Antares of Ormond Beach LLC, TEFRA hearing

Dear Mr. Hall,

Please reference the email communique that I sent to Ms. Murphy a few minutes ago. Based on the reasons stated in that communication, please accept this as the city of Ormond Beach's formal request that the public hearing currently scheduled to be held tomorrow morning be canceled, postponed, or continued to a new date, time, location, and facility that fully complies with the open public meeting requirements of the Florida Constitution and the Florida sunshine law. Further be advised that the city is asserting that it is the local governing authority that has primary jurisdiction over the project and the project site; and in the alternative without waiving the claim to having primary jurisdiction, the city would assert, at a minimum, that it has concurrent jurisdiction with the county. As such, we would request that the IDA defer taking any action on the merits of the application and that the matter be referred back to the city.

Thank you

Randal A. Hayes
Ormond Beach City Attorney
P.O. Box 277
173 S. Beach Street
Ormond Beach, FL 32175-0277
Phone: 386-676-3217
Email: Randy.Hayes@ormondbeach.org

From: Elizabeth Murphy [mailto:emurphy@volusia.org]
Sent: Wednesday, February 13, 2019 4:47 PM
To: Mark <mark@mhalla.com>
Cc: Hayes, Randy <Randy.Hayes@ormondbeach.org>; Charles Hargrove <CHargrove@volusia.org>; Robert Ehrhardt <REhrhardt@volusia.org>; Tangee Murphy <TMurphy@volusia.org>
Subject: Re: Antares of Ormond Beach LLC, TEFRA hearing

Good Afternoon Mark,

My email of a moment ago crossed with Randy's email below.

I am forwarding his request to you as counsel for the IDA on this matter. Please address it.

Thank You,

Elizabeth S. Murphy
Assistant County Attorney
Legal Department
County of Volusia
123 W. Indiana Avenue
DeLand, FL 32720-4613
Office: (386) 736-5950 x. 12950
Fax: (386) 736-5990
e-mail: EMurphy@volusia.org<mailto:EMurphy@volusia.org>

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>>> "Hayes, Randy" <Randy.Hayes@ormondbeach.org<mailto:Randy.Hayes@ormondbeach.org>>
2/13/2019 4:40 PM >>>
Dear Ms. Murphy,

Thank you for discussing this matter with me earlier today. It is not my intention to cause unnecessary issues regarding the public hearing in this matter; however, as we discussed I believe there exists legitimate legal issues regarding the public hearing forum for this matter.

Specifically, the public hearing regarding the referenced matter, as published in the News Journal, provides that a public hearing will occur before the Volusia County Industrial Development Authority at 10:00 a.m. tomorrow morning, February 14, 2019. The public hearing will be held in the Dennis McGee conference room located on the second floor of the Daytona Beach International Airport, 700 Catalina Drive, Daytona Beach, Florida. We believe that the location of the public hearing may violate the open public meeting requirements of the Florida Constitution and the Florida sunshine law, particularly in light of the fact that any member of the general public who wishes to attend the public hearing will be required to pay to park their vehicle in either the short or long term parking lots as a condition to accessing the meeting facility. Most residents who are familiar with the airport understand that in order to access the airport, one must pay to park their vehicle in the airport parking lot. The paid-parking requirement may well serve as an impediment to, or have a chilling effect upon, the ability of members of the general public who desire to attend the public hearing but are either reluctant or refuse to pay to park in order to do so. Allocating now, on the eve of the public hearing, a certain number of parking spaces within the paid parking lot for free parking or posting an on-site notice that residents who desire to attend the public hearing and who pay for parking may have their parking tickets validated or waived would not cure the sunshine law violation. As you may know, any action taken at a public meeting or public hearing in violation of sunshine law requirements renders void (not voidable) any action taken at the public meeting/hearing. I would also like to point out that a representative of the Volusia County School Board who plans to attend the public hearing has also noted the inconvenient forum.

In addition, the parking issue is further compounded by the fact that the public hearing has been scheduled during the Daytona 500 Speed Week. The NASCAR racetrack is situated very near and adjacent to the airport and pedestrian and vehicular traffic is very congested. Many residents avoid the area entirely due to the intense congestion. The race events may well serve as an additional impediment to the ability of the general public to access the airport facility and attend the public hearing.

For these reasons, I would respectfully request that the public hearing in this matter that is currently scheduled to commence tomorrow morning be canceled and that the public hearing be scheduled at a date, time, location, and facility that is more suitable to attendance by members of the general public who may wish to attend, consistent with the principles and requirements of the sunshine law.

Finally, for reasons that we also discussed, I believe the city of Ormond Beach has primary jurisdiction over the project, or at minimum has concurrent jurisdiction with the county of Volusia, since the city is more directly impacted by the project and will exercise various municipal and sovereign powers over the project site. I would therefore respectfully request that the county of Volusia consider deferring jurisdiction

back to the city so we may continue to exercise our due diligence review under federal and state laws regarding this matter notwithstanding the applicants' attempt to shop for a forum that it believes will be more accommodating to its preferences.

Thank you for your thoughtful consideration of these issues.

Randy

Randal A. Hayes
Ormond Beach City Attorney
P.O. Box 277
173 S. Beach Street
Ormond Beach, FL 32175-0277
Phone: 386-676-3217
Email: Randy.Hayes@ormondbeach.org<<mailto:Randy.Hayes@ormondbeach.org>>

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From: Elizabeth Murphy
To: Ehrhardt, Robert
CC: Murphy, Tangee; Hargrove, Charles; CLever@foley.com
Date: 2/12/2019 5:52 PM
Subject: Application for Approval of Tax Exempt Financing -- Antares of Ormond Beach
Attachments: 2 12 2019 Memorandum.pdf

Rob,

Just above the signature block on the application, the Applicant agreed to comply with the terms of the IDA Bond Guide.

The Applicant has provided no financial history as required by Section 10(a) of the IDA Bond Guide, and advised Friday evening that it is declining the county request for a guarantor with a financial history to support the indemnities to the IDA and county. The requirement for three years of projections for new companies is in addition to (not in lieu of) a requirement of financial history, whether that history is from applicants or their guarantors.

The county attorney cannot recommend to the IDA or to the county council approval of a TEFRA application lacking either a financial history or a guarantor with a financial history.

The statements by counsel for the Applicant received Friday night do not give the county legal department comfort. CTA is not the guarantor.

The documents approved and circulated on January 22, 2019 remain the recommended documents.

The PILOT and public purpose considerations are separate from the above issues. Please see attached a memorandum for discussion that covers some of the considerations of interest to the county.

Thank You,

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****PUBLIC RECORDS NOTICE:** Florida has a very broad public records law. Virtually all written communications addressed to or from state and local officials and employees are public records available to the public and media upon request. Volusia County policy does not differentiate between personal and business e-mails. E-mail sent on the County system will be considered public and will be withheld from disclosure only if deemed confidential or exempt pursuant to state or federal law. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this person. Instead, please contact this person by phone or in writing.**



To: Industrial Development Authority
From: E. Murphy, Assistant County Attorney
Re: IDA Qualified Private Purpose Bond TEFRA Approvals
Date: February 12, 2019
C: C. Hargrove, Deputy County Attorney

This is an memorandum on the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") approval process, the pending application for TEFRA approval by Antares of Ormand Beach LLC and the Request by Ormond Beach for a Payment in Lieu of Taxes ("PILOT") agreement.

I. TEFRA

A. Qualified Private Activity Bonds

Pursuant to section 103 of the Internal Revenue Code ("Code"), interest received by investors on eligible bonds is tax-exempt for federal income tax purposes. Interest on private activity bonds qualifies for this tax-exempt treatment if the bonds meet the requirements for "qualified bonds" as defined in section 141(e) and other applicable requirements provided in section 103. Section 141(e) of the Code requires, in part, that qualified bonds meet what is known as the TEFRA public approval requirement of section 147(f).

B. TEFRA Approval

The TEFRA process is meant to provide a reasonable opportunity for interested individuals to express their views on (1) the proposed issuance of bonds, (2) the nature of the improvements and projects for which the bond funds will be allocated and (3) the public purpose of the project that will justify affording the private company the benefit of the proposed tax exempt financing. A bond issue is treated as approved by any governmental unit if such issue is approved either by the elected representatives of the governmental until after a public hearing following reasonable public notice or by voter referendum of the governmental unit. Thus, an applicant may ask the elected officials of a municipality, a county or state government to grant TEFRA review in seeking approval in order to obtain tax exempt financing for its privately owned project. TEFRA approval is not automatic, but is at the discretion of the elected officials.¹

C. TEFRA Substantial Public Benefit

Under the TEFRA, a showing of substantial public purpose or benefit to the public must be demonstrated by the applicant to the satisfaction of elected officials.

According to the Joint Committee on Taxation (H.R. 4961, 97th Congress; Public Law 97-248, 12/31/82, p. 99):

*"...Congress believed that providing tax exemption for the interest on certain IDBs may serve legitimate purposes in some instances **provided that** the elected representatives of the State or local governmental unit determine after public input that there will be **substantial public benefit** from issuance of the obligations..."*

"Congress did not intend that this requirement automatically invoke any State administrative procedural requirements as to hearings in general." [emphasis added]

D. 2019 Changes to TEFRA Process (Effective 4/1/2019)

1. The public hearing notice posting period will be reduced to seven (7) days.
2. Notice may be posted on the agency's or issuer's primary public website.
3. Multiple locations of projects can be treated as a single project, if used in an "integrated operation."
4. Generally, one year delay from public hearing and public approval is fine.
5. Generally, one year delay from public approval and bond issuance is fine.
6. Blind Pools of qualified 501(c)(3) bonds are addressed.
7. Certain post issuance "TEFRA" Cures are available.

II. Antares of Ormand Beach Private Activity Bond TEFRA Application

The Applicant has represented as follows:

- A. New (\$35,000,000) state-of-the-art assisted living and memory care facility with upscale amenities for senior residents (87 Assisted Living + 37 Memory Care). Source: Summary of Benefits ("SOB"), p. 1.
- B. 20% of Beds are Income Restricted. Applicant will enter into a Land Use Restriction Agreement with the Issuer and the Trustee. The Agreement requires a set aside during the qualified project period of at least 20% of the units for tenants whose incomes do not exceed 50% of the applicable area median income, as determined by the US Department of Housing and Urban Development ("HUD"). Source: Report A-14.
- C. According to HUD's 2018 statistics, 50% of the median income in Volusia County, Florida is \$19,500 for a residential unit with one tenant and \$22,300 for a residential unit with two tenants. Source: Report, p. B-14.

- D. Annual rent will range from \$45,000 to \$63,600 (i.e., \$3,750-\$5,300/mth).
Source: Independent Accountants' Examination Report ("Report"), p. B-9.
- E. A nationally renowned expert has opined that there is a need for assisted living units within the Ormond Beach area in excess of total project units.
Source: Summary of Benefits, Applicant Submission. Source: SOB, p. 1.
- F. The project will provide services to seniors within the Ormond Beach community, including providing limited shelter during emergency periods.
Source: SOB, p. 2.
- G. The project will include a small, professionally designed live theater with lighting, video and sound available to community and civic groups and seniors in Ormond Beach. Source: SOB, p. 2.
- H. The facility will serve the growing needs of the Ormond Beach senior community by providing a modern and desirable residence to enjoy their later years in an environment with dignity and proper attention to their living requirements. Source: SOB, p. 2.
- I. When fully ramped, the project will create over 200 construction jobs to be replaced by over 60 permanent jobs. Source: SOB, p.2.
- J. Bonds are authorized to be sold to sophisticated investors in minimum denominations of \$25,000 or any integral multiples of \$5,000 in excess thereof. Source: CTA Resolution No. 06-18, p. 4. Applicant is willing to increase denominations to \$100,000. [Bond Guide, p. 14 requires denomination of not less than \$1M.]
- K. The project will pay an estimated \$3.4 million in local property taxes over the next 10 years, with Ormond Beach to receive 24% of this total (not including additional \$300,000+ impact/permit fees). Source: SOB, p. 2. [When asked how long the bond documents require Applicant to hold the facility, the offer sent by Applicant's counsel was 5 years.]

Applicant certified on December 6, 2018, that it had received, reviewed and agreed to comply with the Guide to IDR Bond Financing, including Section 10 (i), "History of Financial Performance," which requires 3 years of audited financial statements for Applicant, *"third party guarantors and other parties from which revenues to repay the debt are dependent."* Section 10 (i) continues to provide that Applicants in business for less than three years must also submit pro forma projections *"covering the three years following the commencement of operation of the project."*

Applicant has submitted no financial history and has declined county's request to provide a third party guarantor with its own financial history to stand behind Applicant's indemnities to county and the IDA. The requirement for three years of projections for new companies is in addition to (not in lieu of) a requirement of financial history, whether that history is from applicants or their guarantors. Concerns about public purpose and a PILOT agreement aside, the county attorney cannot recommend to the IDA or to the county council approval of a TEFRA application lacking either a financial history or a guarantor with a financial history.

III. Payment in Lieu of Taxes ("PILOT") Agreements

A. Background. As part of the presentation for this project to the city and county to obtain the public financing TEFRA subsidy, Applicant has written that it will pay \$3.4 million in ad valorem taxes over the next 10 years. To ensure that this promise is fulfilled, the city asked Applicant to agree to enter into a PILOT agreement so that in the event it is sold to, merged into or converted into a not for profit organization recognized as such by the IRS, the promise of ad valorem payments will not go unfulfilled.

B. Examples of Florida PILOT Agreements

1. Jacksonville
2. Largo
3. Tallahassee

C. Considerations of PILOT Implications

- a. Goal is to provide by agreement for payment of an amount equivalent to what would be owed in taxes, regardless of subsequent disposition to, merger with or conversion to a not for profit or a for profit that may sell or convert to a not for profit.
- b. A for profit or not for profit might decide not to open or buy a facility in Volusia County if the PILOT is deemed to be a burden on title, making the project less attractive than in counties that do not have a PILOT agreement policy (i.e., a competitive disadvantage).

c. Section 10(a), page 11 of the Guide to IDA Financing and Application states:

Economic Impact. Indicate how the community will benefit by the completion of the project with Industrial Development Revenue Bonds, i.e., new jobs created, existing jobs preserved, business to remain viable in the community, **new capital investment added to**

tax rolls, additional payroll in circulation, project to be located in economic target area, etc. *[emphasis added]*

- d. The IDA is conducting the TEFRA hearing for the county. As the IDA is not the issuer, the hearing is not under the IDA statute. However, for guidance the mission Statement of the IDA is helpful. It provides: *"The Industrial Revenue Development Bond (IRDB) program administered by Volusia County Industrial Development Authority (IDA), provides an alternative tax-exempt financing vehicle for manufacturers and qualifying 501c3 non-profits that are planning capital investment projects in Volusia County. IRDBs are securities issued by the IDA, and approved by County Council."* The mission of the IDA to promote capital investment projects in the county could be argued to be in conflict with the requirement of PILOT agreements as part of ALF TEFRA approvals, as encumbering title with a PILOT requirement might operate to deter capital investment projects.
- e. As a condition of a TEFRA approval, a PILOT agreement has been upheld by the Florida Supreme Court in City of Largo v. AHF-Bay Fund, LLC, 215 So.3d 10 (Fla. 2017).
- f. Such an agreement should not be used to demonstrate public purpose where it does not otherwise exist, but is instead useful to ensure that public funds will not subsidize private entities that market their promise to pay taxes to the taxing authorities, yet, after TEFRA approval, cease paying taxes.
- g. A recent statutory change more favorable to tax exemption of ALFs, discussed below, makes it timely to consider whether PILOTs with their owners should become a matter of policy when TEFRA approval is sought.
- h. Case Study: Just over one year ago, a for profit LLC purchased a \$9M for profit LLC that had been paying ad valorem taxes for 31 years. The LLC received \$26M conduit tax exempt financing and TEFRA approval in December of 2017. Weeks later, it applied for ad valorem tax exemption based on its parent company's status as a 501(c)(3) granted in 2002. Although it was granted partial exemption in 2018 as a home for the aged (income based) by the property appraiser, it appealed to the VAB for a 100% tax exemption as a "home for special services" and as a result the \$9M asset was wiped off the tax rolls. The lawyer for the Applicant in its

successful appeal to the VAB stated "As you know, the Legislature revised the exemption definition statute (section 196.012) this past year to provide for the inclusion of facilities that possess "a valid license under chapter 400 **or part I of chapter 429**" (my emphasis), thereby including assisted living facilities under the type of property identified in section 196.197. " That type of property is "homes for special services. Unlike Section 196.1975, which requires the ALF to meet income tests, Section 196.197 mandates that homes for special services "shall be exempt" if they are a Florida not for profit exempt as of January 1 of the year of application for exemption by having qualified as an exempt organization under the provisions of 501(c)(3) of the Internal Revenue Code.

- i. The total current assessed value of the 77 for profit ALF in Volusia County is \$159,073,977.00, with corresponding annual ad valorem taxation revenue of \$3,185,258.74.
- j. The concern expressed by Ormond Beach, that after obtaining the benefit of tax exempt financing the Applicant will apply for property tax exemption under Section 196.012(a) and 196.197, raises a legitimate public policy concern that lawfully could be addressed by county policy for TEFRA approvals of ALFs.

¹ § 26 CFR part 5f provides, in part:

§1.147(f)-1 Public approval of private activity bonds.
(a) *In general.* ...A private activity bond meets the requirements of section 147(f) **only if the bond is publicly approved pursuant to paragraph (b) of this section or the bond qualifies for the exception for refunding bonds in section 147(f)(2)(D).**
(b) *Public approval requirement--*(1) *In general.* Except as otherwise provided in this section, a bond meets the requirements of section 147(f) if, before the issue date, the issue of which the bond is a part receives issuer approval **and host approval (each a public approval)** as defined in paragraphs (b)(2) and (3) of this section in accordance with the method and process set forth in paragraphs (c) through (f) of this section.
Department of the Treasury, Internal Revenue Service, 26 CFR Pars 1 and 5f [TD 9845] RIN 1545-BG91, Public Approval of Tax-Exempt Private Activity Bonds, Effective date: December 31, 2018. *[emphasis added]*