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LEGAL MEMORANDUM

TO: The Honorable Council Member John Crescimbeni

CC: Jason Gabriel, General Counsel

FROM: Stephen M. Durden, Chief Assistant

RE: City Council Process for Approving Potential JEA Sale

DATE: June 26, 2018

I. Introduction.

In the past few months, the discussion surrounding the idea that JEA might one day be sold, spawned a vast number of questions concerning (1) the process of selling JEA and (2) potential terms of sale.

In your email of April 8, 2018, to the General Counsel you posed a question about the potential sale of JEA, as follows:

> Article 21 of the Charter clearly creates and governs JEA.
>
> More specifically, Article 21.04(p) restricts JEA from transferring any function or operation which comprises more than ten percent of the total utilities system by sale, lease or otherwise to any public utility, public or private without approval of the Council.

> Furthermore, Article 21.11 requires a two-thirds vote of the Council to amend or repeal any portion of Article 21.
>
> With respect to the above, I am requesting a legal opinion on whether a bundle of proposed ordinances to facilitate the outright and complete sale of JEA could be cleverly packaged to require a majority vote instead of a two-thirds vote? If so, how could the ordinances relating to the sale of JEA (which seems to only require a majority vote pursuant to Article 21.04(p)) not constitute a de facto change to the Charter (inasmuch as the sale would eliminate all assets of the JEA and thereby the ability – as well - of JEA to perform the duties detailed throughout Article 21)?

In order to respond to the questions asked, this memorandum will first respond to an unasked question the correct answer to which provides the answer to the questions asked.

II. Questions Presented.

(A) If JEA were to seek to sell 100% of the assets of JEA, must the Council approve by a majority vote or a supermajority vote of two-thirds of the Council?

(B) Whether a bundle of proposed ordinances to facilitate the outright and complete sale of JEA could be "cleverly packaged" to require a majority vote instead of a two-thirds vote.

(C) If so, how could the ordinances relating to the sale of JEA (which seems to only require a majority vote pursuant to Article 21.04(p)) not constitute a de facto change to the Charter (inasmuch as the sale would eliminate all assets of JEA and thereby the ability – as well - of JEA to perform the duties detailed throughout Article 21)?

III. Short Answers.

(A) If JEA were to seek to sell 100% of the assets of JEA, the Council would have to approve such a sale by a majority vote and not a supermajority vote of two-thirds of the Council. On the other hand, the terms of a potential sale and remaining responsibilities or duties of JEA after such a transaction could require an amendment to the Charter (and accordingly a two-thirds vote of the Council).

(B) While it might be that a bundle of proposed ordinances to facilitate the outright and complete sale of JEA could be "cleverly packaged," whether cleverly packaged or not, the Council may approve the sale of 100% of JEA by a majority vote.

(C) The sale of 100% of the assets of JEA is not a *de facto* amendment to the Charter.

IV. **Discussion**.

As to Question (A), General Counsel Opinion 70-354 has already concluded that the City Council has the power to sell the assets of JEA. In reaching that conclusion the opinion noted that "the Charter of the former City of Jacksonville" contained "the following provision":

> The City shall not sell, lease or otherwise part with the control and management of the Water Works or Electric Light plant, but shall continue perpetually the maintenance, control and operation thereof in the interest of its citizens. (Sec. 5, Ch. 5347, Acts 1903).

The opinion went on to discuss the significance of the absence of such a provision in the Charter for the Consolidated Government:

> That provision was not carried forward into the Act creating the Jacksonville Electric Authority. There was no reason to do so because no authority was given Jacksonville Electric Authority to sell or dispose of the public and municipal electric system. On the other hand, there was a reason for such a provision to be in the Charter of the former City, because the former City had general authority in its Charter to sell, lease or otherwise dispose of property of the City.

By the same token the City of Jacksonville also has general power to sell and dispose of property of the City. As set forth in *Section 3.01, Charter*:

> The consolidated government:
>
> ***
>
> (b) With respect to Duval County, except as expressly prohibited by the Constitution or general laws of the State of Florida, *may enact or adopt any legislation concerning any subject matter upon which the Legislature of Florida might act*; may enact or adopt any legislation that the council deems necessary and proper for the good government of the county or necessary for the health, safety, and welfare of the people; may exercise all governmental, corporate, and proprietary powers to enable the City of Jacksonville to conduct county and municipal functions, render county and municipal services and exercise all other powers of local self-government; all as authorized by the constitutional provisions mentioned in subsection (a) and by ss. 125.86(2), (7), and (8) and 166.021(1) and (3), Florida Statutes.
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> ***

The Charter contains no language remotely similar to the language in the pre-Consolidation Jacksonville Charter. Nothing in the Charter appears to even suggest that the City must operate

the electric utility in perpetuity. Given that the prior Charter had such language and given the broad grant of power within *Section 3.01*, the City Council has the power to approve the sale of 100% of the assets of JEA, and such approval is not to be construed as an amendment to *Article 21*.

The City Council acts by majority vote, unless otherwise required by State Law or the Charter.[1] As further pointed out and oversimplified, the Charter (now *Article 21, Charter*) grants to JEA the authority to ***operate*** various utilities of the Consolidated Government, each of which was once owned by the Consolidated Government or the predecessor municipal corporation. Neither the Charter, in general, nor *Article 21*, in particular, ***requires*** the City to own any particular utility service. Instead, *Article 21*, requires that if the Consolidated Government has the utilities referenced in *Article 21*, then operation shall be by the JEA, without the direct political influence of the voters or elected officials. The Charter grants to the City Council power of the purse, the power to approve the budget of the JEA, not the power to control the day-to-day operations of JEA.

The foregoing discussion also answers Question (B). Clever packaging or not the City Council may approve the sale of all the assets of JEA by majority vote. *Article 21* creates and defines the independence of the agency. It does not in any way purport to limit the powers of the

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[1] The various courts of the United States have long recognized the power of the majority of the quorum in legislative bodies. As explained by the United States Supreme Court more than 125 years ago:

> The constitution provides that 'a majority of each [house] shall constitute a quorum to do business.' In other words, when a majority is present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the constitution requires is the presence of a majority, and when that majority are present the power of the house arises.

United States v. Ballin, 144 U.S. 1, 5–6, 12 S. Ct. 507, 509, 36 L. Ed. 321 (1892). A decade ago, the Texas Attorney General explained the common law rule of legislative enactments:

> In order to answer that question [of the validity of a rule requiring a super-majority vote], we must turn to the common law. In 1922, a Texas court stated the common-law rule:
>
> > The general rule is that, in the absence of an express provision to the contrary, a proposition is carried in a deliberative body by a majority of the legal votes cast.
>
> *Comm'rs Court of Limestone County v. Garrett*, 236 S.W. 970, 973 (Tex. 1922) (footnote added). Thus, the general rule in this state is that a governmental body must conduct its business on the basis of a majority of a quorum of members present and voting. As a result, a governmental body may not adopt a rule that requires, in some instances, the vote of a "supermajority."

Tex. Att'y Gen. Op. GA-0554 (2007). The Jacksonville Charter contains various supermajority requirements. Outside of those requirements, the Charter requires that the Council adopt legislation by majority vote of the quorum.

City Council. In sum, the City Council has the power to approve the sale of 100% of the assets of JEA by majority vote.

As for Question (C), the sale of 100 percent of JEA assets neither constitutes a *de facto* change to the Charter nor prohibits the ability of JEA to perform the duties detailed throughout Article 21. As noted above, "the specific purpose of [*Article 21*] is to repose in JEA all powers with respect to electric, water, sewer, natural gas and such other utilities which are now, *in the future could be*, or could have been but for this article, exercised by the City of Jacksonville." *Section 21.01*, *Charter* (emphasis added). *Section 21.04* expands upon those powers.

Section 21.01 contains at least three ideas significant to the answer of Question (C). First, *Section 21.01* contains permissive language, i.e., a grant of powers, not an imposition of duties. The *Charter* no more *requires* the JEA to operate an electric utility than it *requires* the JEA to operate a natural gas utility. If *Section 21.01* contained such requirements, then it might be argued that the sale of the electric utility assets would be a *de facto* modification of the *Charter*. By the same token, if *Section 21.01* contains a set of utility operation requirements, then JEA has operated in violation of the *Charter* from the day *Section 21.01* was amended to concern itself with operating a natural gas utility. Should JEA electric utility assets be sold, then the JEA will have the power to operate an electric utility, but no assets, a situation indistinguishable from JEA's current natural gas utility situation, i.e., the power to operate, but no assets. *Cf. Pollock v. Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 934 (Fla. 2004) wherein the Florida Supreme Court recognized that a statute that "authorizes" an activity "does not establish a legal duty." Finally, as noted above, the former charter required that the City operate an electric utility in perpetuity. Had the Legislature sought to re-impose such a duty, it could have done so.

Section 21.01 also references *future* activities. Upon sale of all assets of the JEA, the JEA could begin investigating future utility activities. One obvious example would be the creation of a natural gas utility. JEA may investigate returning to one of the sold utilities, but in a different form, such as household solar or wind electricity. The speculation need not continue; the point being that after the sale of JEA assets (assuming that were to occur) *Article 21* provides to JEA continuing authority and responsibility to operate the utilities referenced therein in the event the Council provided the funding to obtain the necessary assets.

Section 21.01 provides one other continuing effect after a sale. The City may not operate any of the utilities identified in that section. Should the City seek to operate a utility activity after the sale of the JEA assets, then the *Charter* requires JEA to operate such a utility.

Selling 100% of the assets, then, is not a *de facto* amendment to the *Charter*. Courts have held that privatization does not violate a charter or constitutional provision merely because of the inherent ramifications of privatization. For example, where a charter requires that employees of department of government be entitled to civil service protections, the charter is not violated when

that department is privatized despite the fact that employees for the private entity necessarily cannot have civil service protection. *See, e.g., Haub v. Montgomery County*, 353 Md. 448, 727 A.2d 369 (1999).

As a final note, the sale of JEA could very well create reasons to amend the Charter. For example, a contract for sale, might include a requirement that JEA hold funds in escrow to cover the costs of Plant Vogtle. The *Charter* does not currently permit JEA to act as a kind of escrow agent, consequently, the *Charter* would need to be amended to grant to JEA such power. The speculation could continue. As referenced above, a sale transaction may include provisions that require amendments to *Article 21* thereby creating the need for complying with the enactment requirements of *Section 21.11*.

V. **Conclusion.**

I hope this provides the guidance you seek. Please do not hesitate to contact me if you have further questions.

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