

August 30, 2018

Ed Hunzeker, Manatee County Administrator
1112 Manatee Ave. W.
Bradenton, FL 34205

Re: Proposed Use of Old Jail Building in the Judicial Center for Housing Project

Dear Ed,

I would like to thank you and Mr. Croghan for taking the time to meet with me on September 13, 2018 to discuss your proposed Housing Project. As we discussed in the meeting, in my role as the Manatee County Clerk of Court and Comptroller, it is my responsibility to protect the taxpayers of Manatee County and ensure each check I cut from County funds will be used for a lawful public purpose. While I would be thrilled to see the Old Jail in the Judicial Center renovated, as a matter of law, at this time, with the information available to me, I cannot authorize the payment of County funds for the Housing Project you propose without assurances on the various legal complexities that come with this project. Below is a discussion of these issues that I briefly mentioned, and you requested that I provide to you, in our meeting.

First, while I understand from our meeting that you know you need to develop a plan for the building and operation of the Housing Project, I cannot approve any expenditure of County funds unless and until there exists a concrete plan addressing the parameters of the project. Second, all verbal information indicates the project does not serve a lawful public purpose. Thus, the Housing Project remains undefined and potentially illegal for numerous reasons. This letter identifies and briefly analyzes the reasons that prohibit me from cutting a check to fund any work in furtherance of the Housing Project.

Summary

To date, I have identified the following reasons that prohibit me from cutting a check to fund the Housing Project:

- No written plan exists to allow me to determine whether the Housing Project serves a lawful public purpose.
- The limited information I have indicates the Housing Project has no lawful public purpose, and is potentially illegal for a variety of reasons.
- The Housing Project may result in the County losing its exemption from real estate, ad valorem, and bond taxation because the project does not appear to serve a public purpose.
- Going forward with the Housing Project will necessarily result in exorbitant perpetual costs to the County far above and beyond the mere cost of completing the project itself.
- There are significant financing hurdles facing the project.

Background

You have proposed the Housing Project to County officials and plan to place the project on the Board of County Commissioners' ("BCC") agenda in the future. The following is the limited information I have received on the Housing Project.

You propose "separating" the Old Jail from the parcel of land containing the County Judicial Center and Hensley Public Safety Complex (in terms of utilities, for example) and renovating the Old Jail into furnished rental housing units between 300-600 square feet in size. In addition, you propose to limit rental of those units to "essential services personnel" and, as you have articulated, "millennials"—giving preference to county and state employees first. The County's current Local Housing Assistance Plan defines Essential Services Personnel as "Essential

Services Personnel shall include, but not be limited to, Manatee County's school district employees; police and fire personnel; government employees; health care personnel; retail workers; tourism industry personnel; and food service personnel", but the Plan does not appear to use or apply that term.

The Housing Project would apparently involve the "parceling out" of the Old Jail and the land upon which it sits, and the leasing of the Old Jail and land from the parent land tract. The "parceled out" tract would be leased long-term to the private developer Bernard M. Croghan, but the County would maintain ownership of the land.

According to a prior memorandum by the County Attorney, because the lower floors of the Judicial Center are located beneath portions of the former jail facility, the County cannot dispose of the underlying land without compromising its ownership and control of the Judicial Center. It has been communicated to me verbally by you that you have received estimates of \$1.5 million to separate the utilities of the Old Jail from those in the rest of the Judicial Center. I have not viewed this estimate so it remains unclear to me whether that monetary figure includes anything beyond the separation of the utilities.

I (as Clerk), the Chief Judge of the Twelfth Judicial Circuit, and the County Sheriff previously signed a joint letter to the County opposing the use of the Old Jail for residential housing, based upon security concerns. The Trial Court Administrator has met with you expressing his concerns about security, indicating "[w]e were not opposed to the County creating affordable living space, we just didn't think they could alleviate the security concerns using the old jail." My concerns extend well beyond security. As explained below, authorizing the use of County funds

for the project at this time far exceeds the scope of my lawful authority and raises a myriad of complicated legal and practical challenges, in addition to exorbitant potential costs.

Analysis

At least five significant reasons exist as to why I cannot authorize the use of County funds for the Housing Project. **First**, I cannot authorize the payment of \$1.5 million (or any amount for that matter) for the Housing Project because no written plan exists to allow me to determine whether the project serves a lawful public purpose. **Second**, the limited information I do have appears to show the Housing Project does not have a lawful public purpose, and is potentially illegal for a variety of reasons. **Third**, the Housing Project may result in the County losing its exemption from real estate, ad valorem, and bond taxation because it does not serve a public purpose. **Fourth**, going forward with the Housing Project will necessarily result in exorbitant perpetual costs to the County far above and beyond the mere cost of completing the project itself. **Fifth**, the project faces considerable financial hurdles.

I. No Written Plan Exists for the Housing Project.

One of the many roles of a Clerk of Circuit Court and Comptroller is to pre-audit and verify that expenditures paid are legal and serve a public purpose. *See, e.g.*, Art. V., § 16, Fla. Const. To date, as you acknowledge, there is no definitive written plan for the Housing Project that addresses any of the plans or specifications for the project including, but not limited to, rental requirements, management, maintenance, security, financing, or rules. Although you indicated you intend to draft a plan, at this point, the Housing Project remains just a hypothetical facility where private

individuals are living and sharing utilities with inmates transported and held for court below them. With no definitive plan for the Housing Project, it is impossible for me to determine whether it serves a lawful public purpose as I am required to do.

At this point, it is unclear whether you intend to proceed under the Local Housing Assistance Plan. In the event that you do, the following should be considered. You will need to explain or establish how the project will comply with the Plan's detailed requirements. For example, the Plan includes a section on demolition and reconstruction with specific requirements. The Plan also includes a Rental Development Section that states funds will be awarded to developers for construction, but maxes those funds out at \$300,000. You have already indicated the initial separation of utilities will cost nearly \$1.5 million, but you have not yet proposed where those funds will come from. In fact, it appears the maximum amount of funding under the Plan per year is \$1.3 million (in "State Housing Initiative Partnership Act" ("SHIP") funds under §§ 420.907, et. seq., Florida Statutes), but there are already goals for the use of those funds this year and upcoming years. And the Plan appears to require that the Department of Redevelopment and Economic Opportunity review plans and implement an ongoing review process prior to the adoption of plans, but it is unknown and unclear whether that has occurred yet for the April 2018 version of/changes to the Plan.

I compare this to funding renovations to build a private school over an existing underground school board facility without first having completed the plans for the school facility, without explaining how the school building construction will be funded, without explaining what the curriculum will be, and without any plan for school governance. No entity, public or private,

could or would reasonably do that. Public funds could certainly not be authorized in such circumstances.

II. Failure to Demonstrate Lawful Public Purpose, and Potential Legal Challenges.

What limited information does exist about the Housing Project fails to demonstrate a lawful public purpose, and raises numerous legal concerns. First, as the County Attorney has previously noted, while the Florida County Home Rule Act (§ 125.01, Fla. Stat.) does authorize the County to "[e]stablish and administer programs of housing", and nothing explicitly prohibits a County from establishing workforce housing for government employees, it must be done in a manner that does not contravene any applicable housing laws or constitutional standards.

One of the most significant legal concerns in this regard is that you plan to restrict this housing to those individuals who you referred to as "millennials," and have failed to otherwise establish the legality of the Housing Project under the Federal Fair Housing Act, 42 U.S.C. § 3601, et. seq. (the "FHA"). In fact, it appears that, when speaking to the Trial Court Administrator, you minimized the FHA concerns identified by the County Attorney in their memorandum and seem convinced that you can still limit the rentals in the Housing Project to millennials. Notably, as the County Attorney stated, the FHA "prohibits actions in the housing market that discriminate against potential residents because of race, color, disability, religion, sex, familial status or national origin."

The FHA has been broadly construed to allow claims of 'disparate impact' resulting from restrictions that, although not intended to discriminate against a protected class, nevertheless have

a discriminatory effect. *See Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015). Thus, a restriction that prohibits anyone but "millennials" who are "Essential Services Personnel" from renting units in the Housing Project could result in countless and costly claims and/or lawsuits against the County, particularly where the County would remain the owner of the underlying parcel of land and has provided funding for the project. Moreover, it is unclear who would make the decisions regarding who can and cannot live in the Project and who meets the definition of Essential Services Personnel, especially given the broad definition of that term.

Second, there exists significant tort and other liability for the County if this project proceeds as planned. Any accident, casualty, or loss exposes the County to extensive and undefined liability that is unlikely to be covered by any existing insurance coverage for the Judicial Center property. My understanding is that beyond the County's self-insurance, there exist multiple layers of coverage that involves several companies. Thus, once the project is more defined, it will also have to be vetted with those insurers to ensure it falls within existing coverage, and/or does not result in a loss of coverage because the property is not being used for its intended and stated purpose. My primary concern with the insurance coverage is that an "incompatible" use is now being introduced onto the campus. For example, residential living brings with it items that would otherwise not be found in a Judicial Center such as hot plates, areas for cooking, candles, space heaters, alcohol, etc., which all raise safety, liability, and possibly maintenance concerns.

Third, use of County funds for this project may violate the Florida Constitution. It is well-known that any expenditure of public funds must be for a primarily public purpose, with only incidental or secondary benefit to private purposes or interest. *See generally* art. VII, Fla. Const.;

Fla. AGO 073-222 ("The fundamental criterion for the expenditure of county funds is that such expenditure will serve a county as contrasted to a private purpose. Article VII, s. 1, State Const., impliedly limits the imposition of taxes and the expenditure of tax revenues to public purposes."); *O'Neill v. Burns*, 198 So. 2d 1, 4 (Fla. 1967) (addressing predecessor to article VII, section 1 and recognizing: "It is only when there is some clearly identified and concrete public purpose and the primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished, that the state or its subdivision may disburse, loan or pledge public funds or property to a non-governmental entity. . . .").

Fourth, the Housing Project may in fact violate land use restrictions, and require significant legal work to evaluate those restrictions and potentially get them lifted or changed.

Because you have not yet demonstrated a lawful public purpose for this Housing Project, and significant legal challenges exist, I do not have the authority to authorize any payment for furtherance of this project at this time.

III. Potential Loss of Real Estate, Ad Valorem, and Bond Tax Exemptions.

I am also very concerned about the Housing Project's potential impact on the County's real estate, ad valorem, and bond tax exemptions (which necessarily and likely could involve litigation as well). In *Capital City Country Club v. Tucker*, 613 So. 2d 448 (Fla. 1993), the Florida Supreme Court held that a golf course owned by a municipality, but leased to a non-profit private party and used for nongovernmental purposes, was not exempt from real estate taxation because it was used for a non-public purpose. That same result could reasonably result with the Housing Project—and without any definitive plans for the Project, it remains impossible to predict with any certainty whether it will.

Also, you have not established that that the Housing Project does not violate bond covenants or the Internal Revenue Code, assuming the County has funded any portion of the construction of the Judicial Center with tax exempt bonds (a concern also raised by the County Attorney). The Tax Reform Act of 1986 created distinctions between public-purpose and private-purpose bonds. Any bonds used to fund the Judicial Center would be public-purpose bonds, which are typically exempt from federal taxes (and many state and local taxes). Because the Housing Project will arguably serve a private purpose, at least in part, it could threaten the federal, state, and local tax exemptions associated with any applicable bonds.

IV. Exorbitant Perpetual Costs to County.

In addition, the Housing Project raises a litany of exorbitant and perpetual costs to the County, including, but not limited to:

- Cost of repurposing the Old Jail facility beyond the \$1.5 million;
- Administrative costs required to continually monitor the Housing Project (increased costs of providing or ensuring around the clock certified law enforcement and continued monitoring of whether the residents of the Project meet the definitions of Essential Services Personnel and Millennials, for example) and/or numerous lawsuits if you do not meet the standard of the Federal Fair Housing Standards.
- You mentioned that all tenants will go through an extensive background check, but what about guests that they invite into their residence?
- As a practicing attorney in this community, I have witnessed the campus being placed on lockdown with SWAT Team law enforcement members activated when certain contentious proceedings take place within the Judicial Center. I have witnessed the

need for law enforcement snipers on rooftops. In such instances residents would not be able to enter or exit their own residence which may or may not give rise to legal concerns if there is a lease in place with the County.

- We have many instances where the fire alarms in each building will sound. In those instances where it is not a test but a real emergency, will there be some liability on the part of the County in not evacuating the Housing facility as well or could residents be required to evacuate during such circumstances? Will they maintain independent separate fire alarms and will the Judicial Center be evacuated should an alarm sound in that Housing Complex separate from the Judicial Center? If the fire alarm is a shared alarm with the County, who will bear the cost in the instance of a malfunction and/or maintenance?
- Currently, there are restrictions on firearms in that facility but for certified law enforcement personnel. Legally, I believe that you would not be able to restrict a tenant's Constitutional right to possess a firearm within their own residence. How will this be reconciled? Will guests who are not required to have a background check be permitted to bring a firearm onto a secured government campus? This could lead to significant legal challenges which would be costly.
- Potential establishment of a condominium form of ownership for both facilities (Because the severed facility may share common areas or amenities with the Judicial Center, the County may be required to establish a condominium form of ownership for both facilities (ch. 718, Fla. Stat.)); and

- Significant legal concerns giving rise to potential liability for the County, and expenditure of County funds for litigation and other related costs including tort/other liability (slip and falls, fire, etc.), litigation, taxation, insurance costs, security, reliance on common areas for access, allocation of responsibility for maintenance and casualty loss, etc. By allowing for a residence you are now broadening the scope of an ingress/egress on the premises in order for residents to access the apartments during hours not normally traversed by the public thus increasing the tort liability on the premises.
- Would these residents be permitted to perpetually utilize free Wi-Fi that the County provides for customers who access the buildings on this campus during normal business hours? If so, this is a public resource being utilized for private use around the clock with no lawful business purpose. How will you restrict access to the public County Wi-fi?
- The amount and duration of these listed costs/risks are nearly impossible to quantify, and should at a minimum be carefully weighed against the benefits of the Housing Project.

V. Potential Financing Challenges.

I also want to bring to your attention potential financing challenges related to the Housing Project. Based on my research, if you need to obtain bank financing for any portion of this project, you will have to provide/undergo the following:

- information on building ownership and whether the land will be leased or sold
- all entities and individuals associated with the project in any way

- complete credit and financial underwriting process including business credit check, personal credit check, request for state and federal tax transcripts, financial statements (both personal and professional) for a minimum of 3 years, tax documents for all entities (K1s), verification of all funds used to fund the project
- a check to ensure the property is free and clear of any and all property or legal encumbrances (which in this case would be nearly impossible at this point)
- heightened scrutiny of the financing because a government entity is involved
- I would expect that a lending institution would require Manatee County Government to sign a lease with a clause that Manatee County Government will not unreasonably interfere with the right to operate these apartments. This will not bind the Sheriff, the Courts or the Clerk of the Court. The biggest footnote is that I cannot imagine an instance where those entrusted with the security and functionality of the court system would give up their authority over the operations of the Judicial Center with respect to their right to lock the building down and secure the campus as they see fit. The risk involved with such an investment would most certainly be recognized and given great weight by a lending institution.
- analysis not only by credit/financial underwriter, but also by risk officers that specialize in commercial properties

Of note, it is my understanding that private investors typically undergo a similar process, which is often even more stringent than commercial underwriting.

Moreover, whether financing is from a commercial entity or a private investor, there exists the possibility of mortgage foreclosure (and its associated legal costs) if the project is not

financially viable. If a private investor declares bankruptcy that could potentially tie up the property for a long time because a bankruptcy court will enter a stay possibly preventing the County from taking any action with regard to the property. While I am aware of some "police powers" and "condemnation" exceptions to the bankruptcy stay, the courts vary considerably on the application of those exceptions so it is difficult to predict whether they would apply in this case.

Conclusion

I appreciate the opportunity to address my concerns as Comptroller regarding the Housing Project and express the limitations on my ability to authorize payments with respect to the project in its current form. While I would love nothing more than to see the Old Jail redeveloped and repurposed to benefit our community, it must be done in a manner that is well-defined and serves a legitimate and lawful public purpose. Unless and until I am confident that it does so, I cannot authorize the use of County funds to support it.

My intent in drafting these concerns to you is to bring to your attention those issues that could potentially result in significant financial loss for the County if they are not addressed and considered at the onset of this venture. To date, I am unable to locate any example in this country of local government approving private housing on a secured government campus which houses a judicial system. While the concept and design may be appealing, as your Comptroller, I would be remiss in my duties if I did not caution you to examine these potentially costly issues(both legal and non-legal) to assure the future of our public funds is safeguarded in perpetuity in relation to this unique venture.

Sincerely,

A handwritten signature in cursive script that reads "Angelina M. Colonnese". The signature is written in dark ink and includes a long horizontal flourish at the end.

Angelina M. Colonnese
Clerk of Circuit Court and Comptroller
Manatee County

cc: Priscilla Trace Chair, County Commission, Manatee County
Mitchell Palmer, County Attorney
Dan Schlandt, Deputy County Administrator
Cheri Coryea, Deputy County Administrator
John Osborne, Infrastructure & Strategic Planning Official
Charlie Bishop, Property Management Director