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Sent: Friday, April 04, 2008 8:29 AM
To: Jeff Kobrock
Subject: RE: Follow Up 1st Park

As to First Park, I can provide a more extensive opinion memo, but the basic response follows:

(1) The statute, in section 12, allows for dissolution of the authority, provided that all cities, towns and plantations that have joined unanimously consent to the dissolution.

(2) Withdrawal of individual members is addressed in section 13. Withdrawal is a unilateral decision, but a member that withdraws remains liable (presumably until paid in full) for its *pro rata* share of the annual debt service on any debt contracted by the authority prior to the withdrawal vote.

Section 13 also has a fairly cryptic provision on the effective date of withdrawal. Essentially, withdrawal of any individual member only becomes effective one year after the end of a budget year in which the Authority had sufficient revenues to meet its annual budget. If the Authority has an annual operating deficit, this would extend the waiting period prior to the effective date of the withdrawal. Prior to the effective date of the withdrawal, the City would remain liable for its *pro rata* share of the full annual budget. After the effective date, the City would remain liable just for its *pro rata* share of debt service, as indicated above.

A defect in the original approval process by one or more communities would not dissolve the Authority. The statutory trigger for effectiveness of the Act is approval by municipalities with a combined \$3 billion or higher municipal assessed value. Challenges to the approval process by a single municipality that did not potentially reduce the total assessed value number below \$3 billion would not affect the legal existence of the Authority.

An improper original approval process could, in some circumstances, mean that the municipality concerned was never legally a member of the Authority, and therefore not subject to the members' statutory obligations. However, given the lapse of time, the subsequent issuance of debt by the Authority and lenders' reliance on bond covenants for the debt concerned, the imputed value received by Authority members and general equitable principles, the courts would be unlikely to invalidate an individual municipality's membership in the Authority for any minor defect in the voting or approval process. I would need some information on the particular approval defect alleged to form an opinion about whether it might affect that municipality's member status and obligations.

Section 14 of the statute contemplates that all cities, towns and plantations joining the Authority as initial members must do so by referendum vote held prior to June 30, 1999. The statute is very specific in requiring a referendum, and not a City Council vote.

Section 13, which allows additional members to join after June 30, 1999 if authorized by the initial members, is a little bit clear about the form of approval by the joining municipality. It may be possible that a City Council vote would be enough to become an "additional member".

If Gardiner became an "initial member" on the basis of a City Council vote, without a referendum, then the original approval was invalid. However, I doubt that any court would simply enter its order declaring the City to be free of all membership obligations under the statute. Although the Authority was created by statute, the same sort of entity could also have been created with the same powers and the same funding mechanism, without a referendum vote, by interlocal agreement under the existing general law. The City Council's approval would be valid and binding in that instance. Accordingly, given the amount of time that has passed in which Gardiner has been treated by all concerned as a member of the Authority, the courts might imply a valid agreement on the City's part based on the interlocal agreement statute.

At a minimum, I think the courts would hold Gardiner to its obligation to continue to pay its pro rata portion of debt service on any debt incurred by the Authority during the period of the City's putative membership. I note that the statute contains a requirement for referendum approval of any borrowing by the Authority. Especially if the City followed the statutory procedure for approval of the Authority's bonds, I think the courts would enforce those as an independent obligation, notwithstanding any invalidity in the City's membership.

Again, I can research this at greater length, but if the City joined as an "initial member" based on the City Council's vote, my expectation is that the courts would treat the City's membership as merely voidable, and not as void ab initio. A municipal agreement that is merely voidable can nonetheless be enforced by the courts on equitable grounds. Given the financial obligations that have been undertaken by the Authority since 1999 in part in reliance on the City being a member of the Authority, I would expect the courts to enforce, for the most part, the City's existing membership obligations. At most, the courts might shorten the statutory withdrawal period, for example to allow withdrawal at the end of the current or next fiscal year.