

**RESOLUTION NO. 97-01**

A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA; AUTHORIZING THE ISSUANCE OF A NOTE OF THE TOWN IN THE PRINCIPAL AMOUNT OF \$500,000 TO FINANCE OPERATING EXPENSES OF THE TOWN; PROVIDING THAT SUCH NOTE SHALL BE A GENERAL OBLIGATION OF THE TOWN; PROVIDING FOR THE RIGHTS, SECURITIES, AND REMEDIES FOR THE OWNER OF SUCH NOTE; MAKING CERTAIN COVENANTS AND AGREEMENTS IN CONNECTION THEREWITH; AND PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, THAT:

**Section 1. Authority for this Resolution.** This Resolution is adopted pursuant to the provisions of Article VIII, Section 2 and Article VII, Section 12 of the Constitution of the State of Florida, Chapter 166, Florida Statutes, Chapter 95-494, Laws of Florida, being the Charter of the Town of Fort Myers Beach, Florida, and other applicable provisions of law.

**Section 2. Definitions.** The following words and phrases shall have the following meanings when used herein:

"Act" means Article VIII, Section 2 and Article VII, Section 12 of the Constitution of the State of Florida, Chapter 166, Florida Statutes, Chapter 95-494, Laws of Florida, being the Charter of the Issuer, and other applicable provisions of law.

"Business Day" means any day except any Saturday or Sunday or day on which the Principal Office of the Original Purchaser is closed.

"Clerk" means the duly appointed Town Clerk of the Issuer, or any duly authorized deputy thereof.

"Code" means the Internal Revenue Code of 1986, as amended, and any Treasury Regulations, whether temporary, proposed or final, promulgated thereunder or applicable thereto.

"Issuer" means the Town of Fort Myers Beach, Florida, a municipal corporation of the State of Florida.

"Mayor" means the Mayor of the Issuer, or in his or her absence or inability to act, the Vice-Mayor of the Issuer.

"Note" means the Note of the Issuer authorized by Section 4 hereof.

"Original Purchaser" means NationsBank, N.A. (South).

"Owner" means the Person or Persons in whose name or names the Note shall be registered on the books of the Issuer kept for that purpose in accordance with provisions of this Resolution.

"Person" means natural persons, firms, trusts, estates, associations, corporations, partnerships and public bodies.

"Principal Office" means, with respect to the Original Purchaser, the office located at 13099 U.S. 41 Southeast, Suite 320, Fort Myers, Florida 33907-3835 or such other office as the Original Purchaser may designate to the Issuer in writing.

"Resolution" means this Resolution, pursuant to which the Note is authorized to be issued, including any Supplemental Resolutions adopted pursuant to Section 10 hereof.

"State" means the State of Florida.

"Supplemental Resolution" means any resolution amendatory or supplemental to this Resolution adopted by the Issuer in accordance with Section 9 hereof.

**Section 3. Resolution to Constitute a Contract.** In consideration of the purchase and acceptance of the Note authorized to be issued hereunder by those who shall be the Owners thereof from time to time, this Resolution shall constitute a contract between the Issuer and the Owners.

**Section 4. Authorization of Note.** Subject and pursuant to the provisions of this Resolution, an obligation of the Issuer is hereby authorized to be issued under and secured by this Resolution, in the principal amount of \$500,000, for the purpose of providing funds to pay operating expenses of the Issuer. Because of the characteristics of the Note, prevailing market conditions, and additional savings to be realized from an expeditious sale of the Note, it is in the best interest of the Issuer to accept the offer of the Original Purchaser to purchase the Note at a private negotiated sale. Prior to the issuance of the Note the Issuer shall receive from the Original Purchaser the disclosure statement containing the information required by Section 218.385, Florida Statutes.

**Section 5. Description of Note.** The Note shall be dated the date of its execution and delivery, which shall be January 22, 1997 unless another date is agreed upon by the Mayor and the Original Purchaser, and shall have such other terms and provisions, including the interest rate and maturity date, as stated in the form of Note attached hereto as Exhibit A. The Note is to be in the form set forth on Exhibit A attached hereto. The Note shall be executed on behalf of the Issuer with the manual signature of the Mayor and shall have impressed thereon the official seal of the Issuer, and be attested with the manual signature of the Clerk, and the said Mayor and Clerk are hereby authorized to execute and attest to the Note on behalf of the Issuer.

**Section 6. Registration and Exchange of Note; Persons Treated as Owners.** The Note is initially registered to the Original Purchaser. So long as the Note shall remain unpaid, the Issuer will keep books for the registration and transfer of the Note. The Note shall be transferable only upon such registration books.

The Person in whose name the Note shall be registered shall be deemed and regarded as the absolute owner thereof for all purposes, and payment of principal and interest on the Note shall be made only to or

upon the written order of the Owner. All such payments shall be valid and effectual to satisfy and discharge the liability upon such Note to the extent of the sum or sums so paid.

**Section 7. Payment of Principal and Interest; General Obligation.** The Issuer promises that it will promptly pay the principal of and interest on the Note at the place, on the dates and in the manner provided therein according to the true intent and meaning hereof and thereof.

In each fiscal year of the Issuer while the Note remains outstanding there shall be assessed, levied and collected a tax, on all taxable property within the corporate limits of the Issuer (excluding exemptions as required by applicable law), sufficient in amount to pay the principal of and interest on the Note as the same shall become due. The tax assessed, levied and collected for the security and payment of the Note shall be assessed, levied and collected in the same manner and at the same time as other ad valorem taxes of the Issuer are assessed, levied and collected and the proceeds of said tax shall be applied solely to the payment of the principal of and interest on the Note. The Issuer will diligently enforce its right to receive tax revenues and will diligently enforce and collect such taxes.

**Section 8. Compliance with Tax Requirements.** The Issuer hereby covenants and agrees, for the benefit of the Owners from time to time of the Note, to comply with the requirements applicable to it contained in Section 103 and Part IV of Subchapter B of Chapter 1 of the Code to the extent necessary to preserve the exclusion of interest on the Note from gross income for federal income tax purposes. Specifically, without intending to limit in any way the generality of the foregoing, the Issuer covenants and agrees:

- (1) to refrain from using proceeds of the Note in a manner that would cause the Note to be classified as a private activity bond under Section 141(a) of the Code; and
- (2) to refrain from taking any action or omitting to take any action if such action or omission would cause the Note to become an arbitrage bond under Section 103(b) and Section 148 of the Code.

The Issuer understands that the foregoing covenants impose continuing obligations on the Issuer to comply with the requirements of Section 103 and Part IV of Subchapter B of Chapter 1 of the Code so long as such requirements are applicable.

**Section 9. Amendment.** This Resolution shall not be modified or amended in any respect subsequent to the issuance of the Note except with the written consent of the Owner of the Note.

**Section 10. Limitation of Rights.** With the exception of any rights herein expressly conferred, nothing expressed or mentioned in or to be implied from this Resolution or the Note is intended or shall be construed to give to any Person other than the Issuer and the Owner any legal or equitable right, remedy or claim under or with respect to this Resolution or any covenants, conditions and provisions herein contained; this Resolution and all of the covenants, conditions and provisions hereof being intended to be and being for the sole and exclusive benefit of the Issuer and the Owner.

**Section 11. Note Mutilated, Destroyed, Stolen or Lost.** In case the Note shall become mutilated, or be destroyed, stolen or lost, the Issuer shall issue and deliver a new Note of like tenor as the Note so mutilated, destroyed, stolen or lost, in exchange and in substitution for such mutilated bond, or in lieu of and in substitution for the Note destroyed, stolen or lost and upon the Owner furnishing the Issuer proof of ownership thereof and indemnity reasonably satisfactory to the Issuer and complying with such other reasonable regulations and conditions as the Issuer may prescribe and paying such expenses as the Issuer may incur. The Note so surrendered shall be cancelled.

**Section 12. Impairment of Contract.** The Issuer covenants with the Owner of the Note that it will not, without the written consent of the Owner of the Note, enact any ordinance or resolution which repeals, impairs or amends in any manner adverse to the Owner the rights granted to the Owner of the Note hereunder.

**Section 13. Budget and Financial Information.** The Issuer shall provide the Owner of the Note with a copy of its annual budget and such other financial information regarding the Issuer as the Owner of the Note may reasonably request. The Issuer hereby covenants that it shall promptly give written notice to the Owner of the Note of any litigation or proceeding which if determined adversely to the Issuer would adversely affect the security for the payment of the Note.

**Section 14. Remedies of Noteholder.** Should the Issuer default in any obligation created by this Resolution or the Note, the Owner of the Note may, in addition to any other remedies set forth in this Resolution or the Note, either at law or in equity, by suit, action, mandamus or other proceeding in any court of competent jurisdiction, protect and enforce any and all rights under the laws of the State of Florida, or granted or contained in this Resolution, and may enforce and compel the performance of all duties required by this Resolution, or by any applicable statutes to be performed by the Issuer or by any officer thereof.

**Section 15. Severability.** If any provision of this Resolution shall be held or deemed to be or shall, in fact, be illegal, inoperative or unenforceable in any context, the same shall not affect any other provision herein or render any other provision (or such provision in any other context) invalid, inoperative or unenforceable to any extent whatever.

**Section 16. Business Days.** In any case where the due date of interest on or principal of the Note is not a Business Day, then payment of principal or interest need not be made on such date but may be made on the next succeeding Business Day, provided that credit for payments made shall not be given until the payment is actually received by the Owner.

**Section 17. Applicable Provisions of Law.** This Resolution shall be governed by and construed in accordance with the laws of the State.

**Section 18. Rules of Interpretation.** Unless expressly indicated otherwise, references to sections or articles are to be construed as references to sections or articles of this instrument as originally executed. Use of the words "herein," "hereby," "hereunder," "hereof," "hereinbefore," "hereinafter" and other equivalent words refer to this Resolution and not solely to the particular portion in which any such word is used.

**Section 19. Captions.** The captions and headings in this Resolution are for convenience only and in no way define, limit or describe the scope or intent of any provisions or sections of this Resolution.

**Section 20. Officers and Employees of the Issuer Exempt from Personal Liability.** No recourse under or upon any obligation, covenant or agreement of this Resolution or the Note or for any claim based thereon or otherwise in respect thereof, shall be had against any Councilmember of the Issuer, or any officer, agent or employee, as such, of the Issuer past, present or future, either directly or through the Issuer whether by virtue of any constitution, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise, it being expressly understood (a) that no personal liability whatsoever shall attach to, or is or shall be incurred by, the Councilmembers of the Issuer, or the officers, agents, or employees, as such, of the Issuer, or any of them, under or by reason of the obligations, covenants or agreements contained in this Resolution or implied therefrom, and (b) that any and all such personal liability, either at common law or in equity or by constitution or statute, of, and any and all such rights and claims against, every such Councilmember of the Issuer, and every officer, agent, or employee, as such, of the Issuer under or by reason of the obligations, covenants or agreements contained in this Resolution, or implied therefrom, are waived and released as a condition of, and as a consideration for, the execution of this Resolution and the issuance of the Note on the part of the Issuer.

**Section 21. Authorizations.** The Mayor and any Councilmember, and such other officials and employees of the Issuer as may be designated by the Mayor are each designated as agents of the Issuer in connection with the issuance and delivery of the Note and are authorized and empowered, collectively or individually, to take all action and steps and to execute all instruments, documents, and contracts on behalf of the Issuer that are necessary or desirable in connection with the execution and delivery of the Note, and which are specifically authorized or are not inconsistent with the terms and provisions of this Resolution.

**Section 22. Section 265 Designation Note.** The reasonably anticipated amount of tax-exempt obligations (other than obligations described in Clause (ii) of Section 265(b)(3)(C) of the Code) which have been or will be issued by the Issuer during 1997 does not exceed \$10,000,000. The Issuer hereby designates the Note as a "qualified tax-exempt obligation" for purposes of Section 265(b)(3)(B)(i) of the Code. The Issuer hereby covenants and agrees not to take any action or to fail to take any action if such action or failure would cause the Note to no longer be a "qualified tax-exempt obligation."

**Section 23. Repealer.** All resolutions or parts thereof in conflict herewith are hereby repealed.

**Section 24. Effective Date.** This Resolution shall take effect immediately upon its adoption.

Councilmember Murphy offered the foregoing Resolution. Councilmember Isler seconded the Motion, and upon being put to a vote, the vote was as follows:

|                       |               |
|-----------------------|---------------|
| Anita T. Cereceda     | <u>aye</u>    |
| Ted FitzSimons        | <u>absent</u> |
| William (Rusty) Isler | <u>aye</u>    |
| Garr Reynolds         | <u>aye</u>    |
| Ray Murphy            | <u>aye</u>    |

The Mayor thereupon declared the Resolution duly passed and adopted this 21<sup>st</sup> day of January, 1997.

TOWN OF FORT MYERS BEACH

By:   
ANITA T. CERECEDA, Mayor

Attest:   
Town Clerk

Approved as to form and legal sufficiency:

  
RICHARD V.S. ROOSA, Town Attorney

**EXHIBIT A**

January 22, 1997

\$500,000.00

**TOWN OF FORT MYERS BEACH, FLORIDA**

**PROMISSORY NOTE**

KNOW ALL MEN BY THESE PRESENTS that Town of Fort Myers Beach, Florida (the "Issuer"), a municipal corporation created and existing pursuant to the Constitution and the laws of the State of Florida, for value received, promises to pay from the sources hereinafter provided, to the order of NationsBank, N.A. (South) or registered assigns (hereinafter, the "Owner"), the principal sum of \$500,000.00, together with interest on the principal balance outstanding at the rate per annum of 4.50% (as the same may be adjusted) based upon a year of 365/366 days for the actual number of days elapsed. The interest rate on this Note may be adjusted as hereinafter provided.

In the event that on April 1, 1997, July 1, 1997 or October 1, 1997, respectively, the Issuer has failed to maintain an average quarterly balance on the deposit with the Owner of at least \$500,000 for the quarter ending on the preceding March 31, June 30 or September 30, respectively, then the interest rate on this Note shall be increased for the ensuing quarter beginning on such April 1, July 1 or October 1, as the case may be, to 5.00% per annum, based upon a year of 365/366 days for the actual number of days elapsed.

The interest rate otherwise borne by this Note shall also be adjusted as follows:

(a) Change in Maximum Corporate Tax Rate: If the Maximum Corporate Tax Rate (hereinafter defined) decreases from 35%, the interest rate otherwise borne by this Note shall be increased to the product obtained by multiplying the interest rate otherwise borne by this Note by a fraction, the numerator of which is 1 minus the Maximum Corporate Tax Rate as increased and the denominator of which is .65.

(b) Event of Taxability: If for any reason, the interest on this Note shall become includable for federal income tax purposes in the gross income of the Owner (a "determination of taxability"), then the interest rate otherwise borne by this Note shall be increased by multiplying such interest rate by a fraction, the numerator of which is 1 and the denominator of which is 1 minus the Maximum Corporate Tax Rate, effective as of the earliest date on which interest on this Note becomes includable in the gross income of the Owner. In addition, upon the occurrence of a determination of taxability the Issuer will pay any penalty, interest or addition to tax imposed upon the Owner as a result of the Owner's failure to include interest received on the Note in gross income for federal income tax purposes. All such additional interest, penalties, interest and additions to tax shall be due and payable on the next date upon which interest is payable on this Note. This adjustment shall survive payment of this Note until such time as the federal statute of limitations under which the interest on this Note could be declared taxable under the Internal Revenue Code shall have expired.

As used herein the term "Maximum Corporate Tax Rate" shall mean the highest marginal tax rate applicable to the taxable income of corporations without regard to any increase in tax designed to normalize the rate for all income at the highest marginal tax rate, which on the date hereof is .35.

Principal of and interest on this Note are payable in lawful money of the United States of America at such place as the Owner may designate to the Issuer in writing, in the following manner:

Accrued interest shall be payable on April 1, 1997, July 1, 1997 and October 1, 1997, with a final payment of the entire unpaid principal balance, together with all accrued and unpaid interest thereon, being due and payable in full on December 31, 1997.

If any date for the payment of principal and interest hereon shall fall on a day which is not a Business Day (as defined in the Resolution (hereinafter defined)) the payment due on such date shall be due on the next succeeding day which is a Business Day, but the Issuer shall not receive credit for the payment until it is actually made.

The principal of and interest on this Note may be prepaid at the option of the Issuer in whole or in part at any time, and from any funds lawfully available for such purpose. All payments by the Issuer pursuant to this Note shall apply first to accrued interest, then to other charges due the Owner, and the balance thereof shall apply to the principal sum due. There shall be no prepayment premium.

In case of a default in the payment of principal or interest hereon, unless such failure is cured within ten (10) days after written notice thereof by the Owner to the Issuer, the Owner may declare the entire debt then remaining unpaid hereunder immediately due and payable; and in any such default and acceleration, the Issuer shall also be obligated to pay as part of the indebtedness evidenced by this Note, all costs of collection and enforcement hereof, including such fees as may be incurred on appeal or incurred in any proceeding under bankruptcy laws as they now or hereafter exist, including specifically but without limitation, claims, disputes, and proceedings seeking adequate protection or relief from the automatic stay.

The Issuer to the extent permitted by law hereby waives presentment, demand, protest and notice of dishonor.

To the extent permitted by law, the Issuer, and by its acceptance of this Note, the holder hereof, waive trial by jury in any litigation commenced by either in respect of hereof or of the Resolution.

**THIS NOTE AND THE INTEREST HEREON CONSTITUTES A GENERAL INDEBTEDNESS OF THE ISSUER AND THE FAITH AND CREDIT AND THE AD VALOREM TAXING POWER OF THE ISSUER IS PLEDGED TO THE PAYMENT OF THE PRINCIPAL OF AND INTEREST ON THIS NOTE.**

This Note is issued pursuant to Article VIII, Section 2 and Article VII, Section 12 of the Constitution of the State of Florida, Chapter 166, Florida Statutes, Chapter 95-494, Laws of Florida, being the Charter of the Issuer and a Resolution duly adopted by the Issuer on January 21, 1997, as from time to time amended and supplemented (herein referred to as the "Resolution"), and is subject to all the terms and conditions of the Resolution. All terms, conditions and provisions of the Resolution including without limitation remedies in the event of default are by this reference thereto incorporated herein as a part of this Note. This Note represents the entire authorized issue of obligations of the Issuer pursuant to the Resolution. Terms used herein in capitalized form and not otherwise defined herein shall have the meanings ascribed thereto in the Resolution.

This Note may be exchanged or transferred by the Owner hereof but only upon the registration books maintained by the Issuer and in the manner provided in the Resolution.

It is hereby certified, recited and declared that all acts, conditions and prerequisites required to exist, happen and be performed precedent to and in the execution, delivery and the issuance of this Note do exist, have happened and have been performed in due time, form and manner as required by law, and that the issuance of this Note is in full compliance with and does not exceed or violate any constitutional or statutory limitation.

IN WITNESS WHEREOF, the Town of Fort Myers Beach, Florida has caused this Note to be executed in its name by the manual signature of its Mayor and attested by the manual signature of its Town Clerk, and its seal to be impressed hereon, all this 22<sup>nd</sup> day of January, 1997.

TOWN OF FORT MYERS BEACH, FLORIDA

[SEAL]

Attest:

By: \_\_\_\_\_  
Mayor

\_\_\_\_\_  
Town Clerk

(Form for Transfer)

FOR VALUE RECEIVED, the undersigned hereby sells, assigns and transfers unto (Tax Identification or Social Security No. ) the within Note of the Town of Fort Myers Beach and all rights thereunder, and hereby irrevocably constitutes and appoints attorney to transfer the within Note on the books for registration thereof, with full power of substitution in the premises.

Dated \_\_\_\_\_

\_\_\_\_\_  
NOTICE: The signature to this assignment must correspond with the name as it appears upon the face of the within Note in every particular, without alteration of enlargement or any change whatever.

In the presence of: \_\_\_\_\_