

**CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM**

TO: Arthur Noriega, Executive Director
Department of Off-Street Parking

FROM: Alejandro Vilarello, City Attorney

DATE: February 20, 2003

RE: Tract 3 of "Riverside Plaza" – A-03-066
MIA-03-00002

You have requested a legal opinion on substantially the following questions:

**WHETHER THE DEPARTMENT OF OFF-STREET
PARKING ("DOSP") OF THE CITY OF MIAMI ("CITY")
MAY DEVELOP A PROJECT ON THE REFERENCED
PROPERTY (THE "PROPERTY");**

AND

**WHETHER THE CITY'S RIGHTS WITH RESPECT TO
THE PROPERTY WOULD AFFECT THE AIR RIGHTS, IF
DOSP WOULD ELECT TO DEVELOP THE AIR RIGHTS.**

The answer to both questions is in the affirmative. The Property, however, is subject to certain rights in favor of the City that may affect the financing of the construction of the Project.

DOSP acquired the Property from Alandco, Inc., by Special Warranty Deed dated June 9, 1997 and recorded in Official Records Book 17685, Page 4434 of the Public Records of Miami-Dade County Florida. On August 8, 1997, the parties recorded a Notice of Option and Right of First Refusal (the "Notice of Option") in Official Records Book 17746, Page 2743 of the Public Records of Miami-Dade County, Florida, to give public notice of the City's rights with respect to the Property, as more particularly described in the Agreement between the City and DOSP, dated June 19, 1997, referenced in the Notice of Option. A copy of the Notice of Option is attached hereto as Exhibit "A".

The City's rights with respect to the Property consist of (i) for a period of 10 years (which expires on June 19, 2007): (a) a prohibition against the sale of the Property without the written consent of the City, which may be withheld or conditioned in the City's sole discretion, and (b) the City's right to purchase the Property from DOSP, and DOSP's obligation to sell the Property to the City, for a price equal to the fair market value of the Property, (the City's Option to Purchase") and

(ii) after expiration of the above mentioned 10 year period, if DOSP desires to sell or transfer all or a portion of the Property to a third party, it must first give the City the opportunity to buy the interest being sold or transferred (the "City's Right of First Refusal").

While the City's rights with regard to the Property do not prohibit the development of a project thereon, they may affect a developer's ability to finance the construction of the Project. This is particularly true with respect to the City's Option to Purchase. By way of example, the prohibition against the sale of the Property without the written consent of the City would seem to impair the security of a lender which, in the event of a foreclosure, would be required to obtain the consent of the City to sell the Property to a third party.


Your second question is whether the City's rights to the Property encumber the air rights over the Property. The answer is that they do.

DOSP's ownership of the space above the Property is derived from its ownership of the land. It is a maxim of the law that the ownership of land is not confined to its surface but extends indefinitely upward and downward, or to any extent the owner may choose to occupy it. See generally, City of Miami v. Cloughton Hotels, Inc., 157 So. 2d 196 (Fla. Dis. Ct. App. 3rd Dist. 1963), 42 Fl.Jr.2d, Property, S 7, 73 CJS, Property, S 27. The City has the right to purchase the Property, as owned by DOSP. If DOSP's ownership of the Property is not limited to its surface, then the City's Option should not be limited either. To hold otherwise would be akin to defeating the extent and scope of a mortgage by severing the air rights from the surface of the Property after the granting of the mortgage.

CONCLUSION

DOSP may develop the property located adjacent to the MRC Building without the City's consent. The Property, however, is subject to an option in favor of the City that gives the City the right to buy, and will obligate DOSP to sell, the Property at fair market value for a period expiring on June 19, 2007. Thereafter the City has a right of first refusal, in the event that DOSP desires to sell the Property. The City's option to buy the Property may affect its development if financing is required for construction of the project.

REVIEWED AND APPROVED BY:



Rafael O. Diaz
Assistant City Attorney

attachment

cc: Mayor and Members of the City Commission
Joe Arriola, City Manager
Priscilla A. Thompson, City Clerk

RE: 17746M2743

This instrument prepared by:
Olga Ramirez-Seijas
Assistant City Attorney, City of Miami
444 S. W. 2nd Avenue Suite 900
Miami, Florida 33131

97R359510 1997 JUN 08 14:18

NOTICE OF OPTION AND RIGHT OF FIRST REFUSAL

The undersigned owner ("Owner") of the property legally described as follows:

Tract 3 of "Riverside Plaza" according to the Plat thereof, recorded in Plat Book 139 at Page 43 of the Public Records of Dade County, Florida (the "Property").

heraby gives notice that (i) for a period of 10 years following the date hereof, Owner may not sell the Property to a third party without the written consent of the City, which may be withheld or conditioned in the City's sole discretion; and (ii) following the expiration of the aforementioned period, prior to any sale or transfer of the Property or any interest therein to a third party the Owner is required to give written notice thereof to the City of Miami (the "City") in order to give the City the opportunity to purchase it.

The specific rights and obligations of Owner and City regarding the City's option to purchase and the right of first refusal described in this instrument are described in paragraphs 6 and 7 of the certain Agreement between the City of Miami and the Department of Off-Street Parking for Sale of Tract 3 and Conveyance of Legal Title to Lot 10, dated June 2, 1997, copy of which is on file and may be inspected in the offices of the City Clerk, 3500 Pan American Drive, Miami, Florida 33133.

IN WITNESS WHEREOF the Owner has caused this instrument to be executed this 19th day of June, 1997.

WITNESSES:
[Signature]
Print: Art Noriega
[Signature]
Print: Olga Ramirez-Seijas

Department of Off-Street Parking
of the City of Miami

By: [Signature]
Print: Clark Cook
Title: Executive Director
190 North 13th Street
Miami, Fla. 33132

City DDP Notice of Right of First Opportunity form

EXHIBIT "A"

