CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM

TO: Clarance Patterson, Director
Department of Solid Waste

FROM: Alejandro Vilarello, City Attorney

DATE: September 2, 2003

RE: Applicability of the City's Nonexclusive Franchise Fee and Temporary Roll-Off Container Permit Fee to Miami-Dade County School Board Construction
(File No. A-0300611) (MIA-0300013)

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

> IS THE MIAMI-DADE COUNTY SCHOOL BOARD ("BOARD") EXEMPT FROM PAYING THE CITY OF MIAMI'S ("CITY") COMMERCIAL SOLID WASTE NONEXCLUSIVE FRANCHISE FEE AND THE TEMPORARY ROLL-OFF CONTAINER PERMIT FEE ("FEES") IN CONNECTION WITH THE BOARD'S NEW SCHOOL CONSTRUCTION?

The answer to your question is in the affirmative. The Fees are not applicable to the Board because State law exempts the Board from paying the Fees.

Your question stems from the following events:

On June 12, 2003, the City received correspondence from Attorney John W. Kearns requesting the City to cease charging Lopefra Corporation ("Franchisee") the City's Fees (see Attachment #1). In that letter, Mr. Kearns asserted that the City was prohibited by Florida Statute § 1013.371(1)(a) from imposing any fee in connection with the construction of a school by the Board. On June 19, 2003, the City received another letter from Mr. Kearns essentially stating that he would file a Declaratory Judgment action against the City to enforce the Florida Statute protecting school construction projects from the Fees (see Attachment #2). The City Attorney responded by informing Mr. Kearns that subsequent to a legal review, a response would be forthcoming.

The Fees in question are the City's nonexclusive franchise fee and the temporary roll-off container permit fee, which are charged to the Franchisee for providing Services to the Board.[1/]

[1/] The nonexclusive franchise fee is calculated at 20% of Franchisee's total gross receipts, §22-56(b), Code. The temporary roll-off container fee is calculated at $50.00 per account, for each container utilized, §22-50(b), Code.

The nonexclusive franchise fee is imposed upon all solid waste haulers for the privilege of doing business within City limits. No person, firm or corporation shall remove or transport any solid waste material without first applying for and receiving a nonexclusive franchise from the department to carry on such a business, §22-46(a), Code of the City of Miami ("Code"). Commercial solid waste service ("Service") shall mean the collection and disposal of garbage, trash, recycling, solid and processable waste for all...*governmental and quasi-governmental establishments, including the collection and disposal of construction and demolition debris*, §22-1, Code (emphasis added). As a result, the Franchisee is required to pay the City a nonexclusive franchise fee of twenty percent (20%) of monthly gross receipts, §22-56(b), Code. The term "gross receipts" is defined to mean the entire amount of the fees collected by the franchisee *from any person* within the City for garbage, solid waste, *construction and demolition debris*, trash, litter, refuse and/or rubbish collection, removal and disposal, §22-56(a), Code (emphasis added). The Code exempts no entity, including the Board, from the Fees; and the Fees will apply even if the Board changed Service providers.

The underlying issue here is whether the Fees charged to the Franchisee for Services in connection with the Board's Miami Senior High-School construction project, are exempted under State law. Chapter 1013 of the Florida Statutes provides an exemption to the Board not found in the Code §§ 22-50 and 22-56. Specifically, all public educational and ancillary plants constructed by a board are exempt from all...*impact fees or service availability fees*, §1013.371(a), Fla. Stat. (2002), (emphasis added). The statutory section exempts school districts from the payment of governmental impact fees or service availability fees in connection with new school construction, Hernando County Water and Sewer District v. Hernando County Board of Public Instruction, 610 So.2d 6 (Fla. 5th DCA 1992). In his opinion, the Florida Attorney General stated that the Statute "exempted all educational facilities constructed by district school boards from all state, county, district or municipal impact fees or service availability fees", 84 Op. Att'y Gen. Fla. 11 (1984).

Contrary to the Code the statute exempts the Board from paying the Fees. A potential conflict between the Code and statute is resolved by the State's preemption over the subject matter, i.e. school district expenditure of funds are subject to Legislative direction and control, City of Titusville v. The Board of Public Instruction of Brevard County, 258 So.2d 838 (4th DCA 1970). The legislative body of each municipality has the power to enact legislation concerning any subject matter, except any subject expressly preempted to the state by general law, §166.021(3)(c), Fla. Stat. (2002). Concerning the imposition of the Fee, a municipality may levy...occupational and regulatory fees on such classes of businesses, professions, and occupations, the regulation of which has not been preempted by the state or county, §166.221, Fla. Stat. (2002). Specifically, a municipality may raise, by user charges or fees, amounts of money...and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law, §166.201, Fla. Stat. (2002). Clearly, the Florida Statutes preempt the City's authority to charge and collect the Fee from the Board.

The statute exempts the Fees providing the Fees are impact fees or service availability fees. The definition of the fees to which the exemption applies is found in Rule 6A-2.01(45),

F.A.C. and it includes a fee, tax, user charge or *an assessment imposed by a municipality* or other governmental agency *for an intangible service which is not clearly established at a cost*, Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 496 So.2d 934 (Fla. 4th DCA 1986), (emphasis added). The Loxahatchee definition fits because the Fees are for intangible services calculated in a manner irrespective of costs. The Board is exempted under §1013.371(a) Fla. Stat. (2002), because the Fees are impact fees or service availability fees under the statutory scheme.

The court in Hernando County expanded the definition provided in Loxahatchee River by declaring that an impact or service availability fee is a fee, tax, user charge, or assessment imposed by a municipality or other governmental agency for the privilege of connecting to a system for which there is *no immediate specific requirement for a capital improvement, expansion, or installation*, Hernando County Water and Sewer District v. Hernando County Board of Public Instruction, 610 So.2d 8 (Fla. 5th DCA 1992) (emphasis added). Because the water and sewer plant servicing appellee's schools was operational and there was no immediate specific requirement for a additional capital improvement expansion or installation, the court held that appellant was seeking a fee for the privilege of connecting to the system, which was an exempt charge, Id. at 8.

As in Hernando County, the City is unable to show that the purpose of the Fees are for the privilege of connecting to a system for which there is an immediate specific requirement for a capital improvement, expansion, or installation. In fact, the Franchisee was providing Services at no cost to the City since at least 1999; almost four years before the Board was charged with Fees. Because the City did not incur an immediate capital expenditure to accommodate the Board's Service requirements, the Fees are deemed service availability fees and exempt under § 1013.371(1)(a), Fla. Stat. (2002).

In addition to the statutory provisions and supporting case law exempting the Board from the payment of Fees, the City appears to acknowledge the availability of an exemption. Commercial establishments employing and using the services of a private waste collector holding a valid franchise shall not be liable for the payment of waste fees otherwise required to be paid, §22-92, Code. Commercial property shall mean ...any other business or establishment of any nature or kind whatsoever other than a residential unit, §22-1, Code. From the definition given, the Board qualifies as commercial property and therefore cannot be compelled to pay the Fee. Furthermore, the City is not obligated to charge the Board Fees because for any premises owned, leased or occupied by the State of Florida or any political subdivision thereof, the City may enter into contracts...for the collection, transportation and disposal of solid waste, prescribing rates and charges to be paid by such agency in lieu of the rates herein prescribed, §22-16(d), Code.

To defend the imposition of the Fees upon the Board, the City has a few tenuous arguments at its disposal. For example, the City may argue that it is not charging the Board anything because the Fees are not charged to the Board, but rather are charged to the Franchisee. In this case, the Franchisee is charging the Board the same Fees the City charges the Franchisee.

However, the statute exempts the Fees regardless of their source. The mere shifting of the burden of payment from one party (the Board) to another (the Franchisee) is probably insufficient to defeat the statutory exemption. Directly or indirectly, the Fees cannot reach the Board because their payment is what the statute prohibits. The authority given under the Constitution to a school district to expend tax school district funds is subject to Legislative direction and control, City of Titusville v. The Board of Public Instruction of Brevard County, 258 So.2d 838 (4th DCA 1970). The Florida Legislature exercised its authority to direct and control the Board's expenditures by enacting Florida Statutes § 1013.371(1)(a), exempting the Board from further payments of Fees.

The City may also argue that the Fees are neither impact fees nor a service availability fees. But given the courts' broad interpretation of what constitutes an impact fee or a service availability fee, the Fees would most likely be declared service availability fees, which are hereby exempted. Any constitutional and procedural arguments proffered by the City will likely be defeated because the statute at issue was held not void for vagueness or ambiguity and did not violate due process, equal protection, or other constitutional provisions, Loxahatchee River Environmental Control District v. School Board of Palm Beach County, 496 So.2d 930 (Fla. 4th DCA 1986).

CONCLUSION

The City is prohibited from applying Fees to the Board because §1013.371(1)(a), Fla. Stat. (2002) exempts the Board from the payment of Fees in connection with school construction. In addition, the State preempts the City in matters concerning Fees charged to the Board. A notice in substantially the same form as the one attached, should be disseminated to all Franchisees to prevent Fees from being charged and collected from the Board (or its agent) during school construction projects.

Attachments

(Dept. of Solid Waste Letterhead)

Notice

Effective immediately, the City of Miami shall not require Licensed Commercial Solid Waste Franchisees to charge, collect, and remit to the City of Miami the Nonexclusive Franchise Fee and the Temporary Roll-Off Container Permit Fee for services rendered only to the Miami-Dade County School Board in connection with construction projects, as per Section 1013.371(1)(a), Florida Statutes.

PURPOSE

The purpose of this NOTICE is to communicate to Franchisees the Miami-Dade County School Board's exemption from the payment of the Nonexclusive Franchise Fee and the Temporary Roll-Off Container Permit Fee for solid waste collection services resulting from school construction projects.

SCOPE

The exemption of the fees is limited to the Miami-Dade County School Board and its agent(s) in connection with a school construction project only.

PROCEDURE*

Nonexclusive Franchise Fee, Sec. 22-56, City of Miami Code:

Gross receipts derived from services rendered to the Miami-Dade County School Board in connection with a school construction project are not subject to the twenty percent (20%) nonexclusive franchise fee and shall be excluded from the total monthly gross receipts calculation.

Temporary Roll-Off Container Permit Fee, Sec. 22-50, City of Miami Code:

The fifty-dollar ($50.00) temporary roll-off container permit fee for each container utilized for each ninety (90) day period, will no longer be applicable to the Miami-Dade County School Board in connection with a school construction project.

For questions or additional information, please contact the Department of Solid Waste at (305) _____.

* All records are to be kept and maintained in the manner prescribed by applicable city, state and federal laws and regulations.

Attachment # 1

JOHN W. KEARNS, P.A.
ATTORNEY
431 GERONA AVENUE
CORAL GABLES, FLORIDA 33146

TELEPHONE (305) 371 4044
FAX (305) 666-4699

June 12, 2003

Mr. Alejandro Vilarello, City Attorney
City of Miami
444 SW 2nd Ave., Ste. 945
Miami, FL 33130

Dear Mr. Vilarello:

My son, Charles S. Kearns, of 4101 Braganza Avenue, Miami, FL 33133 is a subcontractor on Miami Senior High School construction project for the School Board of Miami-Dade County. In this connection, he has hired Lopefra Corporation of 2601 SW 69th Court, Miami, FL 33155 to drop off and pick up dumpsters at Miami Senior High School. The City of Miami Waste Department has required Lopefra to pay a permit to leave its dumpsters at the Miami Senior High School which my son uses in his construction at the Miami Senior High School for the School Board of Miami-Dade County.

The City of Miami is prohibited by Florida Statute § 1013.371(1)(a) (effective January 7, 2003) from imposing any fee on dumpsters used in connection with the construction of a school by the School Board of Miami-Dade County. See my letter of May 14, 2003 to the City of Miami, Department of Solid Waste, Attn: R. Mendoza and *the Statute that I am referring to, a copy of which is attached.*

Kindly instruct Mr. Mendoza to stop charging Lopefra Corporation for the dumpsters, which my son uses for construction at the Miami Senior High School. Enclosed is Lopefra's bill to my son for the same. It appears as the "franchise fee".

Sincerely,

John W. Kearns

JWK/nil
Enc.

Cc: Lopefra Corporation (mailed w/enc.)
Charles S. Kearns, G.C. (h/d w/enc.)

LOPEFRA CORPORATION
2601 S.W. 69 COURT
MIAMI, FLORIDA 33155-2826
PHONE: (305) 266-3896
FAX: (305) 266-9825

№ 67042

DATE 5/7 20 03

NAME CHARLES KEARNS

ADDRESS [illegible]

TRUCK Nº.	DRIVER	TIME
101	Joe	7:20 AM PM

ITEMS	DELIVERY Nº.	PICK-UP Nº.	AMOUNT
DELIVERY	[illegible]-313		275 00
PICK-UP		2096	50 00
EXCHANGE			
		TOTAL	325 00

This charge allows for a maximum of 30 days to load the container. If after 30 days the customer does not order a container pick-up or exchange then a charge of $100.00 per month will be assessed. Lopefra Corp. will not be responsible for any damages on the property related to the container.

RECEIVED ______________________

LOPEFRA CORPORATION
2601 S.W. 69 COURT
MIAMI, FLORIDA 33155-2826
PHONE: (305) 266-3896
FAX: (305) 266-9825

№ 67050

DATE 5/6 20 03

NAME Charles Kearn

ADDRESS 2450 SW 1 St

TRUCK Nº.	DRIVER	TIME
1215	Juan	2:30 AM PM

ITEMS	DELIVERY Nº.	PICK-UP Nº.	AMOUNT
DELIVERY			
PICK-UP			
EXCHANGE	AX-44	RX-333	275.00
		20%	55.00
		TOTAL	330.00

This charge allows for a maximum of 30 days to load the container. If after 30 days the customer does not order a container pick-up or exchange then a charge of $100.00 per month will be assessed. Lopefra Corp. will not be responsible for any damages on the property related to the container.

RECEIVED ____________________

LOPEFRA CORPORATION
2601 S.W. 69 COURT
MIAMI, FLORIDA 33155-2826
PHONE: (305) 266-3896
FAX: (305) 266-9825

№ 65936

DATE / / 20

NAME Charles Kearn

ADDRESS 2450 SW 1 St

TRUCK Nº.	DRIVER	TIME
1234	Ezequiel	1:30 AM PM

ITEMS	DELIVERY Nº.	PICK-UP Nº.	AMOUNT
DELIVERY	R20-24		275.00
PICK-UP		PERMIT	50.00
EXCHANGE	[illegible]		
	RE	20%	65.00
		TOTAL	390.00

This charge allows for a maximum of 30 days to load the container. If after 30 days the customer does not order a container pick-up or exchange then a charge of $100.00 per month will be assessed. Lopefra Corp. will not be responsible for any damages on the property related to the container.

RECEIVED ____________________

LOPEFRA CORPORATION
2601 S.W. 69 COURT
MIAMI, FLORIDA 33155-2826
PHONE: (305) 266-3896
FAX: (305) 266-9825

№ 65938

DATE 5/7 20 03

NAME Charles Kearns

ADDRESS 2450 SW 1ST

TRUCK Nº.	DRIVER	TIME
1234	Ezequiel	6:30 AM PM

ITEMS	DELIVERY Nº.	PICK-UP Nº.	AMOUNT
DELIVERY	R20-333		275.00
PICK-UP		20%	55.00
EXCHANGE			
		TOTAL	330.00

This charge allows for a maximum of 30 days to load the container. If after 30 days the customer does not order a container pick-up or exchange then a charge of $100.00 per month will be assessed. Lopefra Corp. will not be responsible for any damages on the property related to the container.

LOPEFRA CORPORATION
2601 S.W. 69 COURT
MIAMI, FLORIDA 33155-2826
PHONE: (305) 266-3896
FAX: (305) 266-9825

№ 65943

DATE 5/7 20 03

NAME Charles Kearn

ADDRESS 2450 SW 1ST

TRUCK Nº.	DRIVER	TIME
1234	Ezequiel	1:30 AM PM

ITEMS	DELIVERY Nº.	PICK-UP Nº.	AMOUNT
DELIVERY			
PICK-UP			
EXCHANGE	R20-37	R20-33	275.00
		20%	55.00
		TOTAL	330.00

This charge allows for a maximum of 30 days to load the container. If after 30 days the customer does not order a container pick-up or exchange then a charge of $100.00 per month will be assessed. Lopefra Corp. will not be responsible for any damages on the property related to the container.

LOPEFRA CORP.
2601 S.W. 69th Ct.
Miami, FL 33155
Telephone: 305/266-3896

Invoice 136103

Customer CK560

Bill To:

CHARLES KEARNS G.C.
4101 BRAGANZA AVE
MIAMI, FL 33133

INV. DATE	DUE DATE	P. O. NUMBER	TERMS	JOB ADDRESS
05/10/03	05/20/03	VERBAL	PAYABLE UPON RECEIPT	2460 SW 1 ST

DATE	QUANTITY	ITEM NO.	UNIT	DESCRIPTION	UNIT PRICE	AMOUNT
05-06-03	1.0	DUMP20	LOAD	ROLL OFF 20 YARDS	275.00	275.00
05-06-03	1.00	MISCHR		SERVICE CHARGE	50.00	50.00
05-06-03	1	FEEFRA	FEE	FRANCHISE FEE	65.00	65.00
05-06-03	1.0	DUMP20	LOAD	ROLL OFF 20 YARDS	275.00	275.00
05-06-03	1	FEEFRA	FEE	FRANCHISE FEE	55.00	55.00
05-07-03	1.0	DUMP20	LOAD	ROLL OFF 20 YARDS	275.00	275.00
05-07-03	1	FEEFRA	FEE	FRANCHISE FEE	55.00	55.00
05-07-03	1.0	DUMP20	LOAD	ROLL OFF 20 YARDS	275.00	275.00
05-07-03	1	FEEFRA	FEE	FRANCHISE FEE	55.00	55.00
05-07-03	1.0	DUMP20	LOAD	ROLL OFF 20 YARDS	275.00	275.00
05-07-03	1	FEEFRA	FEE	FRANCHISE FEE	55.00	55.00

NonTaxable Subtotal	1710.00
Taxable Subtotal	0.00
Tax (7.000%)	0.00
Total Invoice	1710.00

Customer Original

Attachment #2

6/23

RCB, Did you prepare response?

JOHN W. KEARNS, P.A.
ATTORNEY
431 GERONA AVENUE
CORAL GABLES, FLORIDA 33146
TELEPHONE (305) 371-4044
FAX (305) 666-4699

6/20

June 19, 2003

BJr, who did assign this to.? AV

Certified Mail
Return Receipt Requested

Mr. Alejandro Vilarello, City Attorney
City of Miami
444 SW 2nd Ave., Ste. 945
Miami, FL 33130

Dear Mr. Vilarello:

Enclosed is another copy of my letter to you of June 12, 2003 and attachments, to which you have not replied. Once again, we would appreciate your instructing Mr. R. Mendoza of the City of Miami Department of Solid Waste to stop charging Lopefra Corporation for the dumpsters, which my son Charles S. Kearns uses for his construction work, at the Miami Senior High School.

Should we not hear from you in the very near future, we will be forced to file a Declaratory Judgment action against the City of Miami to enforce the Statutes protecting school construction projects from fees such as the City of Miami Solid Waste Department seeks to impose.

Sincerely,

John W. Kearns

JWK/ml
Enc.

cc: Lopefra Corporation
Charles S. Kearns

030619\Vilarello, Alejandro\ltr2