

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

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**TO:** Victor Igwe, Auditor General  
Office of Auditor General

**FROM:** Alejandro Vilarello, City Attorney  
Office of the City Attorney

**DATE:** March 19, 2004

**RE:** Request for Legal Opinion – Hyatt Lease – Audit (A-04-110)  
MIA-04-002

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You have asked for a legal opinion on the following questions relating to the Lease Agreement between the City of Miami and Hyatt Equities, L.L.C. (the "Lease"):

**CAN SQUARE FOOTAGE BE USED AS A BASIS TO ASSESS A MONETARY PENALTY FOR NONCOMPLIANCE WITH THE LEASE AGREEMENT?**

**IF THE ANSWER TO THE FIRST QUESTION IS "NO," WHAT OTHER BASIS CAN BE USED TO ASSESS A PENALTY FOR NONCOMPLIANCE?**

**WHAT ARE THE REMEDIES AVAILABLE TO THE CITY AS A RESULT OF HYATT'S USE OF SPACE IN EXCESS OF THAT SPECIFIED IN THE LEASE AGREEMENT, AS AMENDED?**

**DOES "ALLOCATED" MEAN SQUARE FOOTAGE LEASED TO HYATT OR SQUARE FOOTAGE USED BY HYATT?**

**IS THERE ANY OTHER STIPULATION IN THE LEASE AGREEMENT OR BOND INDENTURE THAT NEGATES NONCOMPLIANCE AS DETERMINED BY INTERNAL AUDIT'S PRELIMINARY AND TENTATIVE AUDIT FINDINGS, WHICH INDICATED THAT THE HYATT MAY BE USING MORE THAN 100,000 SQUARE FEET?**

### **BACKGROUND**

The Lease consists of a Lease and Agreement for Development dated September 13, 1979 between the City of Miami (the "City") and Miami Center Associates, as assigned, assumed and modified by a Restated Lease and Agreement for Development dated as of September 11, 1986 and six (6) amendments, the last of which is between the City and Hyatt Equities L.L.C. ("Hyatt" or "Lessee") and is dated as of July 30, 1997.

Your request for a legal opinion stems from your discussions with this office relative to your preliminary audit finding that the Hyatt is *occupying* more space than provided under the Lease and, therefore, owes the City rent, which you have calculated based on square footage. This finding is based on a schedule/map provided to you by the Department of Public Facilities and the Hyatt, your audit inquiries, and your subsequent walk through, and not by a survey, which, as you correctly noted in your audit findings, has not been performed and constitutes a default under the Lease.

### **DISCUSSION**

Since your questions relate to your preliminary audit findings, we have combined your first three questions and rephrased them, to address the specific topic of your findings, as follows:

**CAN SQUARE FOOTAGE BE USED TO CHARGE HYATT RENT FOR SPACE IT IS USING IN EXCESS OF THE SPACE LEASED UNDER THE LEASE AGREEMENT? IF NOT, WHAT ARE THE REMEDIES AVAILABLE TO THE CITY?**

The answer to the first part of the question is in the negative. The City's remedies are set forth in the Lease, all as more specifically described hereunder.

To answer your question it is important to understand, first, what is the space being leased to the Hyatt under the Lease (the "Leased Space") and second, the nature of the rental payments to the City (the "Rental Payments"). An understanding of what constitutes the Leased Space is important to determine if Hyatt's use of additional space is contemplated and authorized under the Lease. An understanding of the nature of the Rental Payments is important to determine whether rent may be calculated on the basis of square footage. This, which is the ultimate question, can only be determined from the terms of the Lease. A lease, like any other contract, must be construed to give effect to the intention of the parties as manifested by the words used, Sisco v. Rotenberg, 104 So. 2d 365 (Fla. 1958), Meyer v. Caribbean Interiors, Inc., 435 So. 2d 936 (Fla. 3d DCA 1983), Capital Film Laboratories, Inc. v. Heller, 268 So. 2d 191 (Fla. 3d DCA 1972), as a court is not at liberty to read into a lease a meaning that the parties did not express in the language used. Ridgefield Investors v. Mae Elle, Inc., 57 So. 2d 842 (Fla. 1952).

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A. The Leased Space: The space being leased by the City to the Hyatt is defined, in Section 1 of the Lease, as the Air Spaces and the Easements. Since the Lease is also a development agreement, executed prior to and providing for the construction of, the hotel, the Air Spaces are described as the Air Space for the Hotel Tower, the Air Space for the Swimming Pool, and Air Spaces for the Additional Hotel Spaces (which is, in turn defined as the Air Spaces in the Convention Center) by lower, upper and perimetrical boundaries, making references to Exhibits attached to the Lease, and not by square footage. Therefore, to the extent that the improvements have been completed as contemplated in the Lease, the Air Spaces are the areas constructed by the Lessee within the boundaries described in the Exhibits to the Lease.

The Easements are described broadly and, essentially, describe areas that the Lessee may use in common with others, such as:

- the right to use in common with the City, and all others, the public sidewalks, streets, curbs and roadways fronting on and abutting the Project,
- the right of ingress, egress and passageway in, over, through and across portions of the Project as necessary or desirable for entrance, exit and passageway within, to or from the Hotel and the Parking Garage and the Excepted Premises for the use in common of the City and the developer;
- the right of support and right of use and maintain, within the Excepted Premises, all essential structural support elements, pump systems, fire stand pipes, public fire exits, gas, electric, telephone and water utility lines, pipes and conduits, elevator apparatus and banks, meters and meter rooms, heating, ventilating and air-conditioning systems and machinery pertaining to and needed to support and operate the Hotel as a first class hotel; and
- the right of access, for the use, in common of the City and the developer, and the right to inspect, maintain, repair, renew and replace, such columns, supports, foundations, elevator shafts and pits *and other improvements and facilities either in the Demised or Excepted Premises or the Parking Garage.*

Additionally, Amendment No. 5 to the Lease reveals that easements are intended to be used where the lease of space, for Lessee's exclusive use, violates the Trust Indenture Restrictions.<sup>1</sup> Please see Section 6 of Amendment No. 5 which provides that "in the event any of the transfers contemplated hereby cause the Trust Indenture Requirements to be violated, then the parties will negotiate in good faith the conveyance of space by Lessee in exchange for easements from City to permit the use of such space or other rights to permit the use of such space at no cost."

Neither the Air Spaces, nor the Easements are defined in terms of square footage. Instead, the definition appears to be based, primarily, on the space needed by the Lessee to operate a first-class hotel and not on the size of the space itself. Therefore, the finding that the Hyatt is using more space than the space allowed under the Lease must be evaluated in light of the definition of the Leased Space and, particularly, the Easements.

B. Rental Payments: Pursuant to the Lease, the Lessee agreed to pay to the City "Base Rent", "Percentage (or "Additional") Rent" and "Minimum Rent," as described below. In our opinion, none of the components of Rent are based on square footage. If the parties do not intend that the premises be rented on a per square foot basis, then there is no authority for the charging of rent based on the additional square feet being used by the Lessee. *See, generally, Westinghouse Credit Corporation, Grandoff Investments, Inc.*, 297 So. 2d 104 (Fla. 2d DCA 1974).

1. "Base Rent": This component of Rent was a payment of \$2,900,000 which the developer of the hotel was required to pay to the City *prior* to the opening of the hotel and it was computed based on the "average present value of all of the rights of the Developer under this Lease . . . which has been determined by appraisal of two independent, fully qualified appraisers as of April 20, 1978." *Lease Section 3.1*. By its own description, Base Rent was not calculated on the basis of square footage. This is also evidenced by the fact that the Lessee has not been required to pay Base Rent with respect to subsequent expansions of the Demised Premises.

2. "Percentage Rent": Percentage Rent is the biggest component of Rent under the Lease, and is defined as a percentage of gross revenues derived from room rentals and charges and the sale or service of food and beverages in the Hotel or the Convention Center. This component is based on the revenue-producing activity that the parties use as a basis of calculation and not on square footage.

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<sup>1</sup> Essentially, the Trust Indenture securing the bonds issued by the City to finance the construction of the improvements requires that the spaces allocated to the lessee of the Hotel Lease within the Convention Center shall not exceed 100,000 square feet, or 24.9% of the Convention Center. If this requirement is violated, the bonds will lose their income tax deferred status, causing the interest on the bonds to be included in gross income for federal income tax purpose.

3. “Minimum Rent”: This component was added to the Lease on July 1, 1994, pursuant to Amendment No. 5 to the Lease, as the sum of \$125,000 per year, *to be credited against the amount of any Additional Rent* payable for such calendar year. It was intended to be a minimum guaranteed payment of Percentage Rent and, again, unrelated to square footage. It should be noted that Amendment No. 6 increased the amount of Minimum Rent to \$200,000 and deleted the provision that it be credited against Percentage Rent.

A review of the Lease reveals that, except for the initial payment of Base Rent, the consideration payable by the Lessee to the City is based on a percentage of revenues generated by the hotel and not by number of square feet that it occupies. Even the introduction of Minimum Rent, which was included in the Lease as a credit against Percentage Rent, supports this interpretation. Therefore, based on the nature of the lease payments, the charging of rent on per square foot basis cannot be implied from the Lease.

C. Amendments No. 1 and No. 2: Your request for a legal opinion refers us to two amendments which use square footage to compute a payment to the City. You believe these provisions could support the assessment of rental charges based on square footage. Our review of the amendments, as discussed below, reveals that the provisions that you cited do not relate to rent.

1. Amendment No. 1: You make reference to Section 14, Article 18 of Amendment No. 1. This document, however, is not an amendment to the Lease but to another agreement between the City and the original developer of the hotel, that predates the Lease. Nonetheless, the provision that you cite is unrelated to rent. The payment, which is referred to as “Developer’s contribution to Convention Center” is a one time, lump sum payment, from the developer to the City, for the demise of space by the City to the developer, based on square footage. As stated in Section 14, “no further contributions shall be required to be made by Developer to City concerning Convention Center.”

2. Amendment No. 2: Section 4.1 of Amendment No. 2 does not pertain to Lessee’s rental payments but to the amount that the University of Miami must pay the City (or the hotel developer) to exercise an option that the City gave to the University on July 1, 1983 to expand the Conference Center by adding additional space (the “Option Space”). The cost of the option was computed on a per square foot basis. Section 4.1 provides that if the University exercises the option, the hotel developer will be entitled to the option price, as it will be required to relinquish the Option Space (which was previously leased to the hotel developer).

D. Use of Square Footage in Computation of Rent: In order to compute rent on a per square foot basis, the parties must have intended that it be done that way. *See, Westinghouse Credit Corporation v. Grandoff Investments, Inc.*, 297 So. 2d 104 (Fla. 2d DCA 1974). In construing a lease, a court will gather the meaning of the parties from the whole instrument and not form a few lines taken here and there. Berwick Corp. v. Kleinginna Investment Corp., 143

So. 2d 684 (Fla. 3d DCA 1962). In the event of apparently conflicting provisions, it is the duty of the court to construe such provisions so that they do not conflict. Meyer v. Caribbean Interiors, 435 So. 2d 936 (Fla. 3d DCA 1983).

In our opinion, the Lease does not support the contention that the parties intended rent to be computed on the basis of square footage in that (i) the Leased Space is described as Air Rights and Easements in the Project by areas of use, rather than square footage; (ii) the rental payments are based on a percentage of gross revenues rather than on a per square foot basis; and (iii) the references in the Lease to areas by square footage relate to either exchange of space or the cost of acquiring additional space in the Project, which cost is , at all times, paid as a lump sum payment and not rent.

E. Remedies for Use of Space Outside the Scope of the Lease: If the Hyatt is using space *without* the consent of the City, then the City's remedies are pursuant to a declaration of a default under the Lease. The City's remedies for Lessee's defaults, which are not cured within the applicable cure period, are set forth in Sections 18.1 and 18.3 of the Lease. Under Section 18.1, the City has the right to terminate the Lease after giving the Trustee under the Trust Indenture and the mortgagee of record notice of its intent to terminate and provided that the default is not cured by the Lessee or the mortgagee prior to the effective date of termination. The effective date of termination cannot be earlier than 60 days after the date of the notice. Pursuant to Section 18.3 of the Lease, the right to terminate is in addition to any other remedies or means of redress to which the City may be lawfully entitled. This provision allows the City the right to collect damages from the Lessee, which could take into consideration the amount of space being used by the Hyatt.

The charging of rent for the use of additional space is not a remedy under the Lease. In fact, to do so, without declaring a default, would be tantamount to expanding the Leased Space to include the additional space. If the expansion of the Demised Premises (to include the additional spaces) would result in the Hyatt being allocated more than 100,000 square feet of the Convention Center, then this could cause the interest on the bonds issued to finance the construction of the Convention Center to be included in gross income for federal tax purposes exposing the City to liability that we are, at this point, unable to calculate.

If the Hyatt is using the additional spaces *with* the consent of the City and such use causes a violation of the Trust Indenture Requirements, then the remedy is set forth in Amendment No. 5 to the Lease with provides that "in the event any of the transfers contemplated hereby cause the Trust Indenture Requirements to be violated, then the parties will negotiate in good faith the conveyance of space by Lessee in exchange for easements from City to permit the use of such space or other rights to permit the use of such space at no cost." The foregoing provision not only provides a remedy for the violation of the square footage restriction, but also suggests that the use of easements is the appropriate mechanism to allow the Lessee to use additional space and specifically provides that it shall be "at no cost."

Your next question is:

**DOES ALLOCATED MEAN SQUARE FOOTAGE  
LEASED TO HYATT OR SQUARE FOOTAGE USED BY  
HYATT?**

We have not been able to find a case or any other legal material that would respond to this question and, therefore, have resorted to the definitions of “allocate” and “lease” to respond to your question.

Merriam-Webster Dictionary defines “allocate” as “to apportion for a specific purpose or to particular persons or things, to set apart or earmark.” Cambridge Advanced Learner’s Dictionary defines “allocate” as “to give something to someone as their share of a total amount, for them to use in a particular way.”

A “lease” of real estate is defined as an agreement for exclusive possession of lands, tenements, or hereditaments for life, for a term of years, or at will, usually for a specified rent or compensation; it creates in the lessee an interest in the real estate. 49 Am Jur 2d, Landlord and Tenant §19.

Based on these definitions it would appear that the main difference between leasing and allocating is that a lease creates an interest in real property and is accompanied by consideration.

Your last question is restated to read as follows:

**IS THERE ANY OTHER STIPULATION IN THE LEASE  
AGREEMENT OR BOND INDENTURE THAT WOULD  
AUTHORIZE THE HYATT TO USE MORE THAN 100,000  
SQUARE FEET?**

The answer is yes. The parties contemplate the use of the Easements for this purpose, as provided in Amendment No. 5.


**CONCLUSION**

The Lease does not describe the Leased Space and the payment of Rent on a per square foot basis and, therefore, the charging of rent on a per square foot basis cannot be implied from the Lease. If the Hyatt is using space that is not included within the Leased Space without the City’s consent, then the City may declare a default and, if the Hyatt fails to stop such unauthorized use within the applicable cure period, the City may proceed to enforce its rights and remedies under the Lease. The charging of Rent for the use of additional space is not an authorized remedy. Instead, it could imply that the City has authorized the expansion of the Leased Space, which could result in a violation of the Trust Indenture.

If the Hyatt's use of additional space causes a violation of the Trust Indenture, then the Lease requires the parties to negotiate in good faith the conveyance of space by the Hyatt in exchange for easements from City to permit the use of such space at no cost.

PREPARED BY:

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