CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM

TO: Laura Billberry, Assistant Director
Economic Development

FROM: Jorge L. Fernandez, City Attorney

DATE: November 4, 2004

RE: Request for Legal Opinion - Possible Default by Latin American Gourmet, Inc. Regarding Tax Issues
(MIA - 0400007)

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You have requested an opinion on substantially the following questions:

1. **IS LATIN AMERICAN GOURMET, INC. ("MANAGEMENT") IN DEFAULT OF THE MANAGEMENT AGREEMENT ("AGREEMENT") WITH THE CITY OF MIAMI ("CITY") BY ITS FAILURE TO PAY OUTSTANDING AD VALOREM TAXES ("PROPERTY TAXES") ASSESSED BY MIAMI-DADE COUNTY ("COUNTY") PROPERTY APPRAISER FOR THE YEARS 2001, 2002, AND 2003?**

2. **CAN THE AGREEMENT BE ASSIGNED BY THE CITY TO ANOTHER ENTITY?**

3. **CAN THE MANAGEMENT RAISE OBJECTIONS TO THE ASSIGNMENT?**

4. **DOES THE FACT THAT THE AGREEMENT IS A MANAGEMENT AGREEMENT AND NOT A LEASE, CHANGE THE TAXABILITY OF THE CITY'S REAL PROPERTY?**

5. **WHAT IS THE COUNTY'S RECOURSE IF THE AGREEMENT IS TAXABLE?**

Questions one through four are each answered in the affirmative. As for the fifth question, the County's recourse is to initiate legal action to recover or abate unpaid Property Taxes.

DISCUSSION

Your first question is answered in the affirmative. Management's failure to pay Property Taxes is contrary to the language set forth in the Agreement, which was executed by the parties on May, 1992. Management is in default of the Agreement by its failure to comply with State and County laws and for not paying Property Taxes due for the years 2001, 2002, and 2003 on a timely manner.

Section 21 of the Agreement states in pertinent part:

> The Management...shall be responsible for the payment of ***any and all taxes levied*** on him or his operation, by whatever taxing entity. (Emphasis added).

In addition, an amendment to the Agreement (the "Amendment") was executed by the parties on August, 1998. The amendment provided a new section to the Agreement, as follows:

> 4.1 SPECIAL ASSESSMENTS AND TAXES
>
> Management covenants and agrees to pay ***any and all charges, taxes, or assessments, levied against the area and improvements, personal property or operations thereon, including, but not limited to ad valorem taxes***. The Management further covenants and agrees to pay all of said charges, taxes, or assessments, if any, lawfully assessed, ***on such dates as they becomes due and payable***. (Emphasis added).

The unambiguous language in Section 4.1 leaves no doubt that Management is responsible for the timely payment of all taxes including Property Taxes. In addition, Section 14 of the Agreement requires Management to abide by all "rules, regulations, and laws of the City of Miami, County of Dade, and the State of Florida, now in force or hereinafter adopted." In Section 17 of the Agreement, the City reserved the right to cancel the Agreement for any "violation of rules and regulations by the Management or its employees." Furthermore, Section 34 of the Agreement provides for default in the event Management failed to comply with "each and every term and condition" of the Agreement.

Under the expressed terms of the Agreement and the Amendment, the liability of Property Taxes assessed by the County was unambiguously delineated to the Management. The Management and not the City was responsible for the timely payment of Property Taxes assessed by the County. Contrary to the various sections of the Agreement, Property Taxes for the years 2001, 2002, and 2003 remain unpaid and delinquent. Therefore, Management's failure to pay the County three years of Property Taxes, constitutes a blatant default under the expressed terms of the Agreement.

Your second question is answered in the affirmative. The Agreement may be assigned by the City to another entity. Although the term of the Agreement is set to expire on November 30, 2005 (as extended by the amendment), the City is not prevented from assigning the Agreement to another entity. The only prohibition against assignment is found in Section 9 of the Agreement, whereby Management is prohibited from assigning or transferring the Agreement to another entity. There is no such prohibition against the City's rights to assign the Agreement. Therefore, the City is not prevented from assigning the Agreement to another entity.

Your third question is answered in the affirmative. Management is free to raise any objections, including to a court of competent jurisdiction, concerning the City's assignment of the Management Agreement to another entity. However, Management's veracity is suspect once it is found to be in default of the Management Agreement. If default is declared by failure to pay Property Taxes, then Management will lack standing to contest the City's assignment of the Management Agreement.

Your fourth question is answered in the affirmative. The taxability of City owned real property is most likely dependent on the document being a lease (reflecting a landlord-tenant relationship) as opposed to a management agreement (or license). In other words, Property Taxes should not apply to City owned property in cases where the Agreement is a management agreement and not a lease.

The law grants no exemption from Property Taxes to a nongovernmental lessee of governmental property that uses such property for profit-making purposes. Thus, property owned by the City which is leased to a profit-making nongovernmental entity is subject to Property Taxes, unless the lessee performs a public function or uses the property exclusively for literary,

scientific, religious, or charitable purposes.[1] It is the actual use by the lessee of leased City property that determines whether it is taxable under the constitution.[2] However, in the instant case, the property should be exempt from Property Taxes because there is no lease between the parties, but rather an Agreement.

The Agreement is not a lease, exempting the property from Property Taxes. Under a lease, the lessee acquires an estate in the leased property and the tenant has the right to exclusive possession of a defined physical are. On the other hand, the Agreement lacks sufficient indicia of a landlord-tenant relationship to constitute a lease. Under Florida law, the factors that indicate an agreement is a "lease" as opposed to a "license," include: 1) periodic ***rent*** is to be paid on the premises; 2) the agreement is referred to as a lease; 3) the "lessee" has exclusive possession of a particularly described area; and 4) the parties ***clearly intended*** a lease.[3] Whether a particular instrument constitutes a lease or an agreement largely depends on the intent of the parties.[4] It is clear from the terms the parties used that they did not intend to enter into a lease. In fact, the language chosen by the parties in the Agreement is the complete antithesis of a lease. In this case, each of the required elements constituting a lease, are missing from the Agreement; and in the absence of a lease, all property owned and used by the City is exempt from taxation.[5]

However, the County's improper assessment of Property Taxes is insufficient to relinquish Management's responsibility under the terms of the Agreement. The Agreement imposes upon Management a duty to comply with applicable State and County laws, rules, and regulations. The accrual of delinquent Property Taxes not only violates State and County laws, but also violates the expressed terms of the Agreement which require timely payment of all taxes and assessments arising from the Agreement. However, by its own omissions, Management has ignored State and County laws, becoming delinquent for Property Taxes for the years 2001, 2002, and 2003, in contradiction of the Agreement.

At the very least, Management was responsible for contesting the assessment in accordance with Sate law. A taxpayer who objects to the tax assessment may request a conference with the property appraiser to determine correctness of the assessment.[6] In addition, Management could have petitioned the Value Adjustment Board to determine the validity of the assessment.[7] Subsequently, Management also had the opportunity to appeal the Value Adjustment Board's decision in circuit court.[8] As the responsible party in the Management Agreement for the payment of all taxes, Management (and not the City) is the primary plaintiff

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[1] § 196.199 (2)(a), (c), and (4), Fla. Stat. (2004).
[2] *St. John's Assocs. v. Mallard,* 366 So.2d 34 (Fla. 1978); *Straughn v. Camp*, 293 So. 2d 689, 695 (Fla. 1974); and *Dade County v. Transportes Aereos Nacionales,* 298 So.2d 570 (Fla. 1974) (burden was upon the plaintiff to demonstrate that the use to which plaintiff put its leasehold interests qualified the leaseholds for an exemption by filing the requisite application with the county tax assessor).
[3] *Bodden v. Carbonell*, 354 So.2d 927 (Fla. 2d DCA 1978). (Emphasis added).
[4] *4-50 Florida Real Estate Transactions*, § 50.04[2][i].
[5] *Fla. Const. Art. VII* § 3 (2003) and § 196.199 (1), Fla. Stat. (2004).
[6] § 194.011(2), Fla. Stat. (2004).
[7] § 194.011(3), Fla. Stat. (2004).
[8] § 194.171 Fla. Stat. (2004).

in a tax suit.[9] However, Management has neither paid the delinquent Property Taxes nor has it initiated legal action to cure the delinquency. The failure to comply with State and County laws constitutes default under the terms of the Agreement.

Concerning your fifth and final question, assuming Property Taxes were justly and properly assessed against City property in the Agreement, the County's recourse is to initiate legal action to recover the delinquent Property Taxes. In any administrative or judicial action challenging Property Taxes, the property appraiser's assessment is presumed correct.[10] The assessments of Property Taxes for the years 2001, 2002, and 2003 are all within the five (5) year-period statute of limitations.[11] As such, the County may wish to initiate legal action to recover the unpaid Property Taxes.[12] Although the County may not create a lien against City owned property, the County may revoke Management's occupational license and lien property owned by Management anywhere in Florida.[13]

CONCLUSION

Management is in default by failing to comply with the terms of the Agreement, specifically the provisions for payment of all taxes and compliance with State and County laws. Although Management is free to demur, nothing in the Agreement prevents the City from assigning the Agreement to another entity. Finally, although the County's assessment of Property Taxes accruing under the Agreement is highly suspect, the County may at any time initiate legal action to recover what it believes to be delinquent Property Taxes.

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[9] § 194.181(1)(a), Fla. Stat. (2004).
[10] §194.301, Fla. Stat. (2004).
[11] § 95.091, Fla. Stat. (2004).
[12] 196.199 (8)(a), Florida Statutes (2004), provides: any and all of the aforesaid taxes on any leasehold described in this section ***shall not become a lien on same or the property itself*** but ***shall constitute a debt due and shall be recoverable by legal action*** or by the issuance of tax executions that shall become liens upon any other property in any county of this state of the taxpayer who owes said tax. (Emphasis added).
[13] §§ 196.199 (8)(a)and (b); and § 197.432(9), Fla. Stat. (2004).