CITY OF MIAMI
CITY ATTORNEY'S OFFICE
MEMORANDUM

TO: Laura Billberry, Assistant Director
Economic Development

FROM: Jorge L. Fernandez, City Attorney

DATE: April 20, 2005

RE: Request for Legal Opinion – Latin American Gourmet, Inc., Transfer or Assignment of Privileges Pursuant to the Existing Management Agreement with the City of Miami
(MIA - 0500004)

CONFIDENTIAL: THIS DOCUMENT IS NOT SUBJECT TO DISCLOSURE AS A PUBLIC RECORD UNTIL SO NOTIFIED TO THE CONTRARY BY THE CITY ATTORNEY'S OFFICE. This document was prepared by an Assistant City Attorney reflecting mental impressions, conclusions, litigation strategies, or legal theories of the Assistant Attorney in anticipation of imminent civil litigation. This document is exempt from Public Records disclosure as attorney work-product until such time as all litigation and administrative proceeding involving said parties have been concluded. [§ 119.07(3)(l)1, Fla. Stat. (2004)]. The information contained in this memorandum is intended only for the use of the individual named above and others who have been specifically authorized to receive it. If you are not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

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

1. **MAY LATIN AMERICAN GOURMET, INC. ("MANAGEMENT"), TRANSFER OR ASSIGN ITS PRIVILEGES UNDER THE EXISTING MANAGEMENT AGREEMENT ("MANAGEMENT AGREEMENT") WITH THE CITY OF MIAMI ("CITY")?**

Your question is answered in the negative. The Management Agreement, which was executed on May, 1992, clearly prohibits Management from transferring or assigning its privileges to another. Furthermore, under the Management Agreement, Management has no interest rights in the property capable of being transferred or assigned.

DISCUSSION AND ANALYSIS

Generally, contract rights can be assigned unless forbidden by the terms of the contract itself. In this case, the expressed terms of the Management Agreement prohibit Management from transferring or assigning its privileges to another. Section 9 of the Management Agreement states:

> The Management ***shall not assign or transfer its privilege*** of entry and use granted unto it by this Management Agreement. (Emphasis added).

The expressed language in the Management Agreement equates to a mandatory anti-assignment clause. The Supreme Court of Florida has held that contracts are assignable unless the assignment is ***forbidden by the terms of the contract.***[1] Here, the Management Agreement contains an unambiguous anti-assignment clause, expressly prohibiting Management's assignment or transfer of privileges to another. As a rule of construction, a prohibition against assignment will prevent assignment of contractual duties.[2] Applying ordinary principles of contract interpretation, under the plain language of this anti-assignment clause, the Management Agreement could neither be assigned nor transferred. Such contractual provisions against assignability are enforceable in Florida.[3] The obvious intent of the parties is manifested to be that the rights and privileges afforded to Management would not transfer to another.

In addition to the anti-assignment clause, Management has no property rights subject to transfer, because: 1) the Management Agreement is not a lease, which would have provided Management a leasehold interest in the property subject to transfer or assignment; and 2) all improvements and structures upon the land remain City property.

Under the Management Agreement, Management merely assumed the operation and maintenance of City owned property ("Area").[4] Section 10 of the Agreement states:

> The provisions of this Management Agreement do not constitute a lease and the rights of the Management hereunder are not those of

---

[1] *In Re Robert W. Freeman*, 232 B.R. 497 (Bankr. M.D. Fla. 1999). (Emphasis added). See also, *Hall v. O'Neill Turpentine Co.*, 56 Fla. 324, 47 So. 609 (Fla. 1908); *Brunswick Corp. v. Creel*, 471 So. Ed 617 (Fla. 5th Dist.Ct.App. 1985); *Kitsos v. Stanford*, 291 So. 2d 632 (Fla. 3d Dist.Ct.App.), cert. denied, 307 So. 2d 447 (Fla.1974).

[2] *In Re Robert W. Freeman*, 232 B.R. 497 (Bankr. M.D. Fla. 1999).

[3] *Troup v. Meyer*, 116 So. 2d 467 (Fla.3d Dist.Ct.App 1959).

[4] Section 1of the Agreement.

> tenant. ***No leasehold interest in the Area is conferred upon the Management*** under the provisions hereof. (Emphasis added).

Under a lease, the Management would have acquired a leasehold estate in the Area with the right to exclusive possession. However, by its own terms, the Management Agreement is not a lease. Under Florida law, the factors that indicate an agreement is a "lease" 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.[5] Whether a particular instrument constitutes a lease or an agreement largely depends on the intent of the parties.[6] It is clear from the terms of the Management Agreement the parties intended not to enter into a lease. Each of the required elements constituting a lease, are missing from the Management Agreement; and in the absence of a lease, Management has no assignable property interest in the Area.

Management's real property interest in the Area is also extinguished by the fact that all improvements and structures upon the land remain City property; even if Management had paid for such improvements. Section 29 of the Agreement states:

> All additions, partitions, or improvements shall become the property of City and shall remain a part of the Area at the expiration of this Management Agreement. ***All improvements and structures on the site shall become the property of the City***. The cost of renovation of the Area as to alterations, additions, partitions or improvements shall be borne by and is the financial responsibility of Management. (Emphasis added).

Except for any personal property belonging to Management, Management has no property rights in the Area it can transfer or assign to another.

CONCLUSION

Management is prohibited from transferring or assigning its privileges under the Management Agreement to another. To do otherwise, would constitute a breach in the Management Agreement. Furthermore, Management has no property rights in the Area which it can transfer or assign. The Management's sole purpose is to manage, operate and maintain the Area. There are no interests in the Area conferred to Management under the Management Agreement, that Management can assign or transfer.

---

[5] *Bodden v. Carbonell*, 354 So.2d 927 (Fla. 2d DCA 1978) (Emphasis added).
[6] *4-50 Florida Real Estate Transactions*, § 50.04[2][i]

PREPARED BY:

Roland C. Galdos
Assistant City Attorney

REVIEWED BY:

Rafael O. Diaz
Assistant City Attorney

cc: Mayor and Members of the City Commission
Joe Arriola, City Manager
Priscilla Thompson, City Clerk
Peter Kendrick, Lease Manager, Economic Development