CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - #08-007

TO: Commissioner Marc D. Sarnoff, District 2

FROM: Julie O. Bru, City Attorney

DATE: August 29, 2008

RE: Legal Opinion – Solid Waste Franchise Fee for Commercial Hauling

You have requested a legal opinion on the following question:

> WHETHER THE CITY'S SYSTEM FOR CHARGING AND COLLECTING SOLID WASTE FRANCHISE FEES IS APPROPRIATE?[1]

For the reasons set forth below, your question is answered in the affirmative.

ANALYSIS

One of the core functions of municipal government that the City of Miami provides to the inhabitants and visitors to the City is the provision of solid waste services. The solid waste services that the City provides include waste collection, transfer, recycling, resource recovery and disposal. The recipients of the services can be broken down into two main categories (1) the single family home owner (including duplex owners) and (2) everyone else.

The City provides waste and trash collection and other services directly to the single family and duplex owners. Every year the City imposes a special assessment for solid waste

[1] This question was amended because it was premised on several incorrect statements of fact. The original question presented was: "[w]hether Condominium owners who pay a double tax can be relieved of the obligation to pay the excise tax apportioned to their waste disposal fees (they already pay the City waste removal fee)[?]. The question was thereafter clarified by Mr. Tory Jacobs who wrote the following: "A clarification: condo owners do not pay the City for waste removal services, but they do contribute to the City's subsidizing the service to single-family homeowners via the ad valorem tax payments. Then, the commercial waste haulers are mandated to add an excise tax to condo invoices which, in turn, are passed on to the City."

The first misstatement of fact in the original question is that condominium owners pay a double tax for waste services since they already pay the City waste removal fee. Condominium owners do not in fact "already pay a waste removal fee to the City." This was confirmed by Mr. Jacobs in his clarifying e-mail. The second element of the alleged double taxes does not exist either since no taxes, special assessments or fees for solid waste services are levied upon condominium owners. The second misstatement of fact in the original question is that condominium owners are obligated to pay an excise tax apportioned to their waste disposal fees. There is no such excise tax. The premise in Mr. Jacobs clarifying e-mail that commercial waste haulers are mandated to add an excise tax to condo invoices is likewise inaccurate. The City has actually attempted to limit the amount of fees that commercial solid waste haulers can pass on to the ultimate customer. Finally, Mr. Jacobs' assertion that condominium owners subsidize solid waste services to single-family homeowners via the ad valorem tax payments is without merit.

services on its single family and duplex owners.[2] In addition the single family owners pay ad valorem taxes to the City[3]. The City also directly provides other types of solid waste services to single family, duplex owners and everyone else. The Solid Waste Department empties trash bins in the public right or way, cleans streets, picks up illegally dumped trash, clears privately owned lots that are full of debris, and provides other services to protect the health and safety of the citizens and visitors to the City. These functions are funded from the general fund which is mainly derived from ad valorem taxes.

The City does not directly provide solid waste services to privately owned properties that are not single family or duplex units. Rather, the City has created a franchise system of private haulers that collect and dispose of solid waste from these properties. Section 22-2 of the Code of the City of Miami, Florida ("City Code") provides

> "Every commercial property shall utilize the waste collection services of a franchisee authorized to perform such services by the director. It shall be the responsibility of the owner, occupant, tenant or lessee of the commercial establishment to properly dispose of all trash, waste and garbage generated by such commercial property." A commercial property is defined to mean "any hotel, motel, roominghouse, tourist court, trailer park, bungalow court, apartment building with rental apartments, cooperative apartments, and/or multiple-story condominium buildings and any other business or establishment of any nature or kind whatsoever other than a residential unit as defined in this section." *Sec. 22-1 City Code.*

Commercial property owners do not pay a special assessment to the City for solid waste services. The City has not levied a tax for solid waste services upon commercial property owners. The City does not require commercial property owners to pay a fee for solid waste services. The commercial property owner simply must enter into an agreement with any of the franchisees that are authorized to collect solid waste in the City. The terms of the agreement are negotiated between the private hauler and the commercial property owner. It is a voluntary agreement entered into by two private entities and the City is not a party to said agreement.

The franchise fees that are the subject of this legal opinion are fees charged to the private solid waste haulers and not commercial property owners. The City charges the private haulers a franchise fee for the privilege of collecting solid waste in the City[4][5]. The privilege includes the

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[2] Last year's solid waste assessment was $325 per single family unit (a duplex is charged for each unit). This year's assessment has not yet been imposed. The proposed rate of assessment for fiscal year 2009-2009 is $419 per unit.

[3] An "ad valorem tax" is a tax based upon the assessed value of property. *See* § 192.001(1), Fla. Stat. (2008). The term "ad valorem tax" may be used interchangeably with the term "property tax." It is not based on the amount of municipal services that a property receives or is eligible to receive.

[4] **Sec. 22-50. Franchise fees; permit per account fee(s); annual franchise fee; annual specialized waste handling fee.**

(a) Each and every franchisee shall pay a permit per account fee annually of $50.00 for each account and each roll-off effective October 1st of every new fiscal year to those accounts and roll-offs booked as of October 1st of every new fiscal year with whom they contract for the provision of commercial solid waste services and/or specialized waste handling services, including each container and/or roll-off utilized by franchisee in the course of

providing solid waste services. The franchisee may only pass on an amount not to exceed $24.00 of said permit per account fee to each contracted customers. Said permit per account fee shall not be transferable. Effective October 1, 2004 the annual period will begin October 1st and end September 30th.

(b) Beginning October 1, 2004, each and every franchisee shall pay an annual franchise fee by October 1 each year of the franchise term (and of any extension thereof) in the initial amount of $5,000.00, with such franchise fee being increased by $500.00 per year beginning October 1, 2005. Failure to remit the required annual franchise fee by the due date shall result in a one and one-half percent penalty per month on the balance due.

(c) Beginning October 1, 2004, each and every franchisee whose primary business is limited to solid waste that requires special handling and management shall pay an annual specialized waste handling permit fee by October 1 each year of the franchise term (and of any extension thereof) in the amount of $1,000.00 for the right to provide only specialized waste handling services within the city limits. If a franchisee is providing only specialized waste handling services within the city, then annual franchise fee will increase by $500.00 per year beginning October 1, 2005. Failure to remit the required annual franchise fee by the due date shall result in a one and one-half percent penalty per month on the balance due.

(d) Certified recovered materials dealers excluded from local franchise requirements pursuant to § 403.7046, Fla. Stat. shall be required to pay a registration fee as determined by the director of the department for an annual period which will begin October 1st and end September 30th of each year.

[5] **Sec. 22-56. Franchise fee requirement; monthly franchise fee payment; approval by director as a prerequisite to issuance; financial statements, list of accounts; account permit fees; roll-off permit fees.**

(a) No person shall engage in the business of removing or disposing of garbage, trash, or waste from any premises in the city or transport garbage, trash or waste through the public rights-of-way of the city without first having secured a franchise for such activities. All persons shall be required to obtain a franchise from the city in order to engage in commercial solid waste collection and disposal from any streets, public rights-of-way or property in the city. This fee shall be in addition to the occupational permit tax ordinance of the city.

(b) Effective October 1, 1994, all city-franchised commercial solid waste haulers will be required to pay to the city a franchise fee of eight percent of the franchisee's monthly total gross receipts. Said franchise fee shall be increased to 12 percent effective October 1, 1995, and to 15 percent effective October 1, 1996. Said franchise fee shall be further increased to 22 percent, effective October 1, 2004. The franchisee shall, on or before the last day of each month, deliver to the city finance department a true and correct statement of gross receipts generated during the previous month from its services rendered within the city on or before the last day of each month. Payments of said fee shall be made on a monthly basis to the city finance department, on or before the last day of each month, representing gross receipts collected the previous month. The franchisee shall on or before 60 days following the close of each fiscal year deliver to the director a statement of its annual gross receipts generated from accounts within the city prepared by an independent certified public accountant reflecting gross receipts within the city for the preceding fiscal year. The franchisees will allow city auditors, during regular business hours after reasonable notice, to audit, inspect and examine the franchisees' fiscal books and records and tax returns, insofar as they relate to city accounts, to confirm the franchisees' compliance with this section. In the event the franchisee fails to pay the full franchise fee percentage of the franchisee's total monthly gross receipts, the city shall charge a penalty of one and one half percent per month on the outstanding balance until paid and additionally the franchisee shall have to pay all expenses of collection, including court costs and reasonable attorneys fees.

(c) To effectively provide for the payment of said franchise fee by the franchisees to the city, any person seeking to renew his annual local business tax receipt pursuant to the provisions of chapter 31 of this Code shall, in addition to the requirements set forth therein, provide the city finance department with evidence of all fees imposed by the provisions of this chapter as a condition to reissuance or renewal of said business permit.

(d) Issuance of a franchise shall require completion of an application form for the franchise referenced in section 22-47 of this chapter.

(e) The director is authorized to suspend, revoke, or cancel any such franchise for failure to comply with any of the terms hereof, in accordance with the same practice and procedures as are set forth in section 22-48 of this chapter; providing, however, that the director shall afford an existing franchisee a written notice reasonably specifying the reason(s) for the proposed revocation or suspension of an existing franchise, and the franchisee shall be afforded five business days to cure the noncompliance stated in such notice.

right to use the City streets, the costs of infrastructure maintenance and the right of access to numerous City customers, among other things.

An assertion has been made that the franchise fee that the City imposes on the private haulers is actually a tax imposed on commercial property owners (condominiums). In fact, the original question indicated that commercial property owners (condominiums) were required to pay a double tax to the City. The commercial property owners, who were the impetus for this legal opinion, thereafter conceded that they do not directly pay the City for solid waste services. Nevertheless, they continue to complain that they are subject to double taxation because the private haulers are passing the franchise fee, they call it an excise tax, onto them and because a portion of the ad valorem taxes that they pay subsidizes the single family homeowner's solid waste collection.[6]

As the Third District Court of Appeal opined in *Flores v. City of Miami*, 681 So.2d 803 (3d DCA 1996), an analogous case that analyzed the City of Miami's franchise fee for street vendors, "[t]his graduated scheme of franchise fees is not a tax. The *Flores* court then went on

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(f) Any decision of the director under the terms of this section may be reviewed, upon written request of the aggrieved franchisee made to the city manager in accordance with the same time period and procedure as are set forth by section 22-49, City Code.

[6] The *Klemm* case informs us that payment of ad valorem taxes and an assessment or fee for the same purpose does not equate to double taxation:

> "The imposition of an ad valorem tax twice against the same person or property for the same purpose because of such ownership would be double taxation in violation of law, but both impositions must be taxes as distinguished from other impositions. If one is a tax and the other a license fee or special assessment, double taxation is not accomplished. *Cooley on Taxation*, 229; *Hamilton, Taxation by Special Assessment*, § 21. It is also well settled that two taxes for the same purpose, one general and the other special, are not obnoxious as double taxation when all taxable property in the district is subject to both taxes. *Jackson v. Neff*, 64 Fla. 326, 60 So. 350, 352; *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421; *Lainhart v. Catts*, 73 Fla. 735, 75 So. 47; *Hiers v. Mitchell*, 95 Fla. 345, 116 So. 81; *Cooley on Taxation (4th Ed.)* 223.
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> It may with propriety be said in this connection that our Constitution does not prohibit double taxation. Addressing itself to that point in *Jackson v. Neff*, supra, this court said:
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> 'The power of the Legislature is unrestricted to impose ad valorem taxes by a duly enacted statute where the limitations imposed by the state Constitution as to uniform and equal rates and just valuations are observed, and the organic provisions as to due process and equal protection of the laws are not violated. Even double taxation may not violate constitutional limitations where uniformity of rates, just valuations, and due process are observed, and no unjust discriminations are imposed so as to preserve the organic right to equal protection of the laws.'
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> Aside from the question of double taxation, the principle is well established in this country that in addition to his proportion of a laid tax a taxpayer may be required to pay an additional amount to make up deficiencies caused by the neglect or inability of other taxpayers to pay their assessments, and that such additional impositions do not violate constitutional inhibitions against double taxation nor requirements of equality and uniformity, nor do they amount to the taking of one's property without due process of law." *Klemm* at 631-632

to describe the difference between taxes, special assessments and fees. Such a discussion will probably be helpful at this juncture.

In *Klemm v. Davenport,* 100 Fla. 627, 631-32, 129 So. 904, 907-08 (1930), the Florida Supreme Court provided the following distinction between a tax and a special assessment:

> "A 'tax' is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform. A 'special assessment' is like a tax in that it is an enforced contribution from the property owner, it may possess other points of similarity to a tax, but it is inherently different and governed by entirely different principles. It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as a result of the improvement made with the proceeds of the special assessment. It is limited to the property benefited, is not governed by uniformity, and may be determined legislatively or judicially. Cooley on Taxation (3d Ed.) vol. 2, 1153; Words and Phrases Second Series, vol. 4, p. 625, and cases there cited. See also *Whitney v. Hillsborough County* (Fla.) 127 So. 486; *Atlantic Coast Line R. Co. v. Lakeland* (Fla.) 115 So. 669, *text* 683."

The United States Supreme Court distinguished between a tax and a user fee, defining a tax as providing revenue for the general support of the government, while defining a user fee as imposing a specific charge for the use of publicly-owned or publicly-provided facilities or services. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 621-622, 101 S.Ct. 2946, 2955, 69 L.Ed.2d 884, 896-897 (1981).

In a more recent case, the Florida Supreme Court defined taxes thusly: "In common parlance, a tax is a forced charge or imposition, it operates whether we like it or not and in no sense depends on the will or contract of the one on whom it is imposed." *Jacksonville Port Authority v. Alamo Rent-A-Car,* 600 So.2d 1159 (Fla. 1st DCA), quoting *State ex rel. Gulfstream Park Racing Association v. Florida State Racing Commission,* 70 So.2d 375, 379 (Fla.1953) [.

In *City of Plant City v. Mayo,* 337 So.2d 966 (Fla.1976), the Florida Supreme Court reviewed a decision of the Public Service Commission that municipal franchise fees paid by electric utility companies in Florida should no longer be considered as a general operating expense payable by all of the utilities' customers, but rather should be separately billed by the utility to the customers of the municipalities which impose the fees. The Court rejected the Commission's arguments which analyzed the cities' franchise fees as taxes:

> "we have absolutely no difficulty in holding that the franchise fees payable by Tampa Electric are not 'taxes'. The cities would lack lawful authority to impose taxes of this type and, unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities."

In *Jacksonville Port Authority v. Alamo Rent-A-Car,* 600 So.2d 1159 (Fla. 1st DCA), *rev. denied,* 613 So.2d 1 (Fla.1992), the First District Court of Appeal held that the city port authority's 6% gross receipts charge on off-airport rental car agencies was not a tax. The parties had stipulated that the six percent fee did not directly correlate with any cost analysis performed and that the fees Alamo paid were used to generate revenue for support of all three local airports, even though Alamo only served one of the airports. The court cited the analysis of the California Court of Appeal in *Alamo Rent-A-Car, Inc. v. Board of Supervisors,* 221 Cal.App.3d 198, 272 Cal.Rptr. 19, 25 (1990):

> "We are convinced the fees need not relate only to use of the airport roads and shuttle stops, but may apply to general airport maintenance and operational costs. They are not levied merely to cover the costs of a service *enlarged* because of the presence of Alamo. Rather, construction and maintenance of the Airport was undertaken for airline passengers, which in turn are the customers for both on- and off-site rental car companies. Alamo is but one of the businesses which flock to the area, desiring to pluck a portion of the existing commuter market arising from the Airport's already-established facility. The added burden Alamo places on the Airport includes, of course, the element of increased traffic from Alamo's shuttle buses and the need for a pickup/dropoff area. The benefit Alamo receives, however, flows from all phases of the airport operation.
> ...
> [T]he charge must be treated as a fee for specific entities which choose to operate on, and derive financial benefit from, the Airport, a self-financing activity. This fee is not a special tax. " 600 So.2d at 1163.

In discussing how the City of Miami could use the franchise fees the *Flores* Court indicated:

> "The *Jacksonville Port Authority* court concluded that in *Contractors & Builders Ass'n v. City of Dunedin,* 329 So.2d 314 (Fla.1976), the Florida Supreme Court indicated that "the unrestricted use of ... funds within the system for which the fee is imposed would present no constitutional defect," and that the City of Dunedin "could have used the funds for purposes entirely unrelated to the facilities that benefit those who pay the fee." 600 So.2d at 1164.
> ...
> *Dunedin* stands for the general proposition that absent specific constitutional or statutory authority, revenues exacted from a private entity for the privilege of using municipal services must be earmarked to cover expenses occasioned directly by extending service to that entity. *City of Plant City v. Mayo,* 337 So.2d 966 (Fla.1976), and its progeny, *City of Hialeah Gardens v. Dade County,* 348 So.2d 1174 (Fla. 3d DCA 1977), *cert. den. and appeal dismissed,* 359 So.2d 1212 (Fla.1978); *Jacksonville Port Authority v. Alamo Rent-A-Car,* 600 So.2d 1159 (Fla. 1st DCA), rev. denied, 613 So.2d 1 (Fla.1992); and *Santa Rosa County v. Gulf Power Co.,* 635 So.2d 96 (Fla. 1st DCA 1994), stand for an alternative proposition. Municipalities may exact fees as recompense from

those who are given special rights to use public land. The use of the fees collected need not strictly satisfy the *Dunedin* constraints, but rather the fees need only fund the general municipal plan or purpose that allows the infringement of the public right-of-way by the franchise recipients." *Emphasis added*

The solid waste franchise fees collected by the City from the private haulers clearly satisfy the parameters of the *Flores* decision.

Finally, the last part of the original question that has not been addressed thus far is whether the City could eliminate the franchise fee that condominium owners have to pay while leaving the remainder of the franchise fee intact. This question presents two concerns. The first concern is that, as stated previously herein, the franchise fee is not imposed on any of the commercial property owners. Section 22-56 of the Code provides that all City-franchised commercial solid waste haulers will be required to pay to the city a franchise fee of twenty two percent of the franchisee's monthly total gross receipts. It is the private hauler that pays the franchise fee, not the condominium owner. Nevertheless, the City Code could be amended to exempt the monies garnered from condominiums. Such an exemption would lead to the second concern. It would be difficult for the City to provide a rational basis for treating similar properties differently. There are no real distinctions between the service that a private hauler provides to a condominium versus an office building since the hauler uses the same roads and essentially performs the same service. Such disparate treatment of similar properties could lead to a challenge from the rest of the commercial property owners that the franchise system is unconstitutionally discriminatory or could simply lead to the invalidation of the franchise fee on other grounds.

CONCLUSION

We have determined that the commercial property owners (condominiums) are not double taxed; that franchise fees are not taxes; and, that the franchise fees collected from the private haulers are appropriate. Therefore, unless legislatively or judicially determined otherwise, the City may properly require commercial solid waste haulers to pay a franchise fee to the City for the privilege of collecting solid waste within the City of Miami.

PREPARED BY: REVIEWED BY:

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cc: Honorable Mayor and Members of the City Commission
Pedro G. Hernandez, City Manager