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

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| TO: | Laura Billberry, Assistant Director<br>Department of Economic Development |
| FROM: | Jorge L. Fernandez, City Attorney |
| DATE: | March 21, 2005 |
| RE: | Re-execution of City of Miami and AT&T Revocable License Agreements with New Cingular Wireless PCS, LLC<br>(MIA-0500003) |

You have asked me for a legal opinion on substantially the following question:

**Must the City of Miami ("City"), as the licensor of City owned property under four existing revocable license agreements ("RLAs") with AT&T Wireless Services of Florida, Inc. ("Licensee"), re-execute the RLAs with New Cingular Wireless PCS, LLC ("Cingular"), as the surviving company of Licensee's acquisition and subsequent merger?**

Your question is answered in the affirmative. The City must re-execute RLAs with Cingular as the surviving company of Licensee's acquisition and subsequent merger. Under the expressed and unambiguous terms of the RLAs, assignment or transfer of Licensee's privileges to another entity is entirely prohibited. Furthermore, the license to use City property under the RLAs was a personal privilege afforded only to Licensee. Since the Licensee was merged out of existence, the license terminated with the Licensee; and the rights and privileges under the RLAs could not transfer to Cingular. Therefore, the City must re-execute RLAs with Cingular, as the new surviving entity.

The RLAs at issue are four revocable license agreements previously executed between the City and Licensee. The RLAs conveyed to Licensee, a license for the use and occupancy of City-owned rooftop spaces for the purpose of installing, operating and maintaining unmanned micro cell telecommunications equipment at the following locations: the Police Garage (400 NW 2 Avenue); the Orange Bowl (1501 NW 3 Street); the Fire College (3425 Jefferson Street); and the Coconut Grove Convention Center (2700 Bayshore Drive). The RLAs were each adopted and

authorized by City Commission Resolutions.[1] The terms of the RLAs extended until such time either party terminated the RLA in writing.[2]

On October 26, 2004, Licensee merged with and into New Cingular Wireless Services of Florida, LLC. Subsequently, in an effort to reduce the number of legal entities affiliated with Cingular Wireless, several entities including Cingular Wireless Services of Florida, LLC were merged out of existence. This occurred when, on December 31, 2004, New Cingular Wireless Services of Florida, LLC, merged with and into Cingular. As a result, Licensee ceased to exist, and Cingular became the new surviving entity.

The RLAs' anti-assignment clause prevents transfer or assignment of Licensee's privileges. Generally, contract rights can be assigned unless forbidden by the terms of the contract itself. The Supreme Court of Florida has held that contracts are assignable unless the assignment is prohibited by statute, is contrary to public policy, or where, as in this case, ***assignment is forbidden by the terms of the contract***.[3] Here, the RLAs contain an unambiguous anti-assignment clause, expressly prohibiting Licensee's assignment or transfer of privileges to another.[4] As a rule of construction, a prohibition against assignment of the contract will prevent assignment of contractual duties.[5] Applying ordinary principles of contract interpretation, under the plain language of the anti-assignment clause, the RLAs could neither be transferred nor assigned. The obvious intent of the parties is manifested to be that the rights and privileges afforded to Licensee under the RLAs would not transfer to another. Such contractual provisions against assignability are enforceable in Florida.[6]

In addition to the anti-assignment clause, the licenses conveyed to Licensee under the RLAs were a mere personal privilege which could not be transferable without the City's express permission.[7] A license, whether express or implied is not a right but is a ***personal privilege***, not assignable without express permission of licensor.[8] A license is generally defined as a mere ***personal privilege*** to do acts upon the land of the licensor of a temporary character, and revocable at the will of the latter.[9] The license is simply a permit to use another's property to do

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[1] Resolution Nos. 01-1117 (Oct. 25, 2001); 01-1118 (Oct. 25, 2001); 01-1119 (Oct. 25, 2001); and 02-272 (March 14, 2002), respectively.

[2] Under the "**Occupancy and Use Period**" clause, each RLA was to continue until: (a) cancellation or termination by the express written agreement of the parties; (b) cancellation or termination by request of any of the parties, subject to the notice provisions.

[3] *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).

[4] The "**No Assignment or Transfer**" clause states, "Licensee cannot assign or transfer its privilege of occupancy and use granted unto it by the Agreement."

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

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

[7] The interest conferred by the RLAs is a "mere personal privilege."

[8] *Devlin v. Phoenix, Inc.*, 471 So. 2d 93 (Fla. 5th DCA 1985). (Emphasis added).

[9] *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58 (1913). (Emphasis added).

a particular act, or series of acts, upon another's land without possessing any estate therein.[10] A license conveys no interest in the land and may not be assigned or conveyed by the Licensee.[11] Here, there was nothing the Licensee could have assigned or transfer to Cingular. The Licensee had only a mere personal privilege without permission to transfer. The personal privilege enjoyed by the Licensee to occupy and use City-owned properties, terminated with the Licensee.

## CONCLUSION

The City must re-execute RLAs with Cingular as the surviving company of Licensee's acquisition and subsequent merger. Following the Licensee's acquisition, the Licensee was merged out of existence and the rights and privileges afforded under the RLAs could not transfer to Cingular. The expressed terms of the RLAs prohibited Licensee's transfer or assignment of privileges to another. In addition, the license conveyed to Licensee to occupy and use City property, was a mere personal privilege which could not be transferred without the City's expressed permission. Hence, the rights and privileges afforded to Licensee under the RLAs cannot be assigned or transferred to Cingular.

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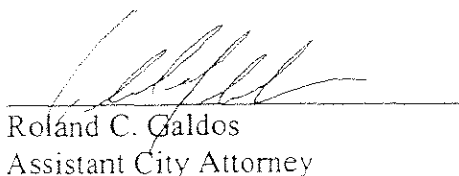

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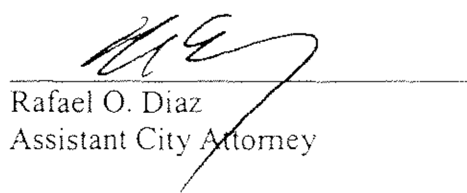

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cc: Peter J. Kendrick, Lease Manager
Judith Marsie-Hazen, Sr. Project Representative

[10] *Devlin v. Phoenix, Inc.*, 471 So. 2d 93 (Fla. 5th DCA 1985).
[11] *Brevard County, Florida v. Blasky*, 875 So.2d 5 (Fla. 5th DCA 2004).