

NON-FLOOD ASSET PROTECTION MANAGEMENT AUTHORITY
LEGAL COMMITTEE MEETING MINUTES
DECEMBER 2, 2010 – 3:30 P.M.

The regular monthly meeting of the Legal Committee of the Non-Flood Asset Protection Management Authority was held on Thursday, December 2, 2010 at 3:30 P.M., in the Lake Vista Community Center, 2nd Floor, 6500 Spanish Fort Blvd., New Orleans, Louisiana after due legal notice of the meeting was sent to each Board member, the news media, and a copy of the call was posted.

Commissioner Ernst called the meeting to order at 4:02 p.m. and led in the Pledge of Allegiance.

The roll was called by Mr. Capo and a quorum was present.

PRESENT

Chairman Greg Ernst
Commissioner Joe Hassinger
Commissioner Michael Bridges
Commissioner Wilma Heaton

FURTHERMORE PRESENT

Commissioner William Hoffman

STAFF

Louis Capo, Executive Director
Sharon Martiny, Non-Flood

ALSO PRESENT

Gerard Metzger
Charles Curtis
Albert Pappalardo

APPROVAL OF AGENDA

Commissioner Bridges offered a motion to adopt the agenda, seconded by Commissioner Hassinger and unanimously adopted.

APPROVAL OF PRIOR MINUTES

Commissioner Ernst offered a motion to approve the minutes of the November 4, 2010 meeting with two minor corrections, seconded by Commissioner Hassinger and unanimously adopted as amended.

OPENING COMMENTS

None.

OLD BUSINESS

1. Gerard Metzger Legal Professional Services Contract for January-December 2011

Chairman Ernst informed Mr. Metzger's contract for 2011 is currently not on the fiscal year. The suggestion is to amend his contract to work on the fiscal year starting July 1 and the new contract would run from January 1 through June 30, 2011. Chairman Ernst suggested making the clarification that the contract is for the first six months of 2011 and the new contract for fiscal year 2012.

Commissioner Bridges offered the motion and suggested the contract amount be set at \$100,000. Chairman Ernst agreed, seconded by Commissioner Hassinger and unanimously adopted for recommendation to the full board.

Chairman Ernst then referred to the extension of the contract by \$70,000 and stated the \$220,000 total budget will be exceeded and it is necessary this be increased further by \$10,000 which should be sufficient for anticipated legal expenses through December 2010. Commissioner Bridges offered a motion to further increase Mr. Metzger's contract by \$10,000, seconded by Commissioner Hassinger and unanimously adopted for recommendation to the full board.

NEW BUSINESS

1. Discussion of Act 1014 and RFQ requirements for Leases

Mr. Metzger thanked the Committee for approving the contract and stated that it has been a pleasure to represent the District and it continues to be. Mr. Metzger then referred to Act 1014 and whether RFQ's need to be issued or any type of public bidding for the District's real estate since adoption of Act 1014. Previously the answer was no, reason being the Board was already granted authority by the Louisiana legislature in the 1920's which provisions were originally in the Constitution of Louisiana. The Board was exempted from having to comply with the public sale and public lease bid laws, which is unique in Louisiana. This authority was granted to help defray expenses for the ground reclaimed for Lake Pontchartrain and the lakefront consisting of five zones, four of which have been developed up to the Industrial Canal. Because of the language used in Act 1014 placing this Authority as successor to the former Board and DOA and its management position over the assets, there was language that concerned Mr. Metzger and prompted him to write the memo put together on November 2. The language found in the amendment of Title 38 basically said that Non-Flood Protection Asset Management Authority is placed within the Department of Transportation and Development and shall perform and exercise its powers, duties and functions and responsibilities in the manner provided for agencies transferred in this provision. Every agency of the State of Louisiana with the authority to sell or lease property must comply with public bid laws. Mr. Metzger's concern was: will this Board have to comply with those laws. There are six sections and two parts to Act 1014. Sections 1 and 2 are where this language is found and it is only effective through the end of this year, the effective date of the legislation on August 15, 2010 to the end of 2011 at which time you are re-vested with the same authority that the Board and the DOA had as a political subdivision of the State of Louisiana, which is in Section 330.12.1 that comes into effect on January 1, 2012.

Section 1 placed the Board under the DOTD and Section 2 enacted the temporary Sections 330.12 and 330.12.1. The language referred to was in Section 1, the Amendment to Title 38 Section 509 on page 1 of the Act. Section 2 enacted 330.12 granting the Authority management and control over assets of the Levee District within its District, meaning Orleans Levee District, to the Non-

Flood Asset Management Authority. It says *for purpose of this section only, the Authority shall be the successor to the former Board and the State of Louisiana.*

Section B is where problematic language came in. The Statute that runs out at the end of next year states the Authority has the right to enter into contracts. Section B (1) provides you can enter into cooperative endeavor agreements with individuals and political subdivisions. B(2) is the provision with language that reflects plenary authority, which provides that you have authority to sell, lease or otherwise transfer any such property and perform any and all things necessary to carry out the object of this Section. This is where the sale language is on payment of indebtedness. This language states if you sell anything the money will pay any judgments so you have to be aware of that if this Board sells anything. A lease is not a transfer, meaning that transfer fee is not paid to the Judgment holders. Further, the Right of First Refusal states if the Authority determines the sale, lease or transfer of such property is appropriate; it shall first offer the property to political subdivisions in the parish in which the property is located and state agencies conducting operations in that parish. If a public entity is interested in acquiring the property, the Authority shall evaluate proposals submitted by those entities. If no such proposal is received or if such proposals are not determined to be in the best interest of the Authority, the property may be offered for sale or lease. In short, you are now required to give notice to lease a parcel on the New Basin Canal to the City. If the City would like to lease property you've got the right to refuse because it is not in the best interest of the Orleans Levee District.

Mr. Metzger further stated you are cloaked with authority and fiduciary duty to handle the property. Mr. Metzger suggested if property is leased a form letter be developed and sent certified mail to the entities, we think, need to receive such notice giving them 10 days to respond. There is no time period in this legislation and the default rule in the Civil Code is if you don't have a time period in a right of first refusal and it is real estate, it is 30 days by default. We suggest 30 days if you wanted to go by that default rule, but we are not talking about selling, we are talking about leasing. A standard letter would go out informing that we are complying with the legislation. Ultimately, it would be up to the Board. If you prefer an opinion from the Attorney General's office, I could present the issue in such a fashion that they will conclude what I am saying. The law is on my side going back to 1978 in *Arnold v. The Board*. In Mr. Metzger's opinion this legislation was not intended to take away plenary authority of the Board. My personal opinion as a lawyer, I do not think this is necessary, we can defend our position and take action with this property without that.

Chairman Ernst questioned what this would apply to. Is there some particular property - not the water bottom or the property itself but the real estate - that might be transferred? Mr. Metzger stated any lease of reclaimed property; meaning all of your rental property because it is on reclaimed ground or anything on the New Basin Canal.

Commissioner Heaton questioned if the recommendation was ignored could the lease be challenged. Mr. Metzger stated yes, there is no doubt about that. Even if you get an Attorney General's opinion it can be challenged because it is an opinion.

Chairman Ernst added that he did not read this as applying to the lease situation; it applies to a sale or transfer. Mr. Metzger informed this provision on the right of first refusal says, "If the Authority determines that the sale, lease or transfer of such property is appropriate, it shall first offer." It uses the word "lease"; that is why it applies to the lease.

Chairman Ernst added what is different is when they talk about the Bohemia provision that only applies to a sale or transfer but for this, it applies to the lease as well.

Mr. Metzger added any possible lease on New Basin Canal or the Marinas has to be offered to a political subdivision or agency. If it is not determined to be in the best interest of the Authority, the property may be offered for sale or lease as otherwise provided by law, meaning after the Board adopts a resolution and makes the decision on who it is going to lease property to. The word *lease* applies to every unit in this building and every location on the New Basin Canal. Orleans Marina has always been historically considered reclaimed so it would apply there too.

Mr. Curtis concluded that there are hundreds of boat slip leases. How could they have intended boat slip leases go to a right of first refusal; technically, that is what it says. Mr. Metzger informed that these are properties subject to the legislation.

Commissioner Heaton recommended Mr. Metzger, as the attorney for the Board, sit down with the author of this legislation, Senator Morrell. Mr. Metzger agreed. Commissioner Heaton added that Senator Morrell would realize compromises taken place at the 11th hour on the last day of session to get this done and that there are glitches. It might expedite things on the political and legislative front if Mr. Metzger met with Senator Morrell and expressed the committee's concerns and came back to the full Board after discussions with Senator Morrell. Commissioner Heaton recommended having a partnership and remedy in this and to expedite that partnership through communication.

Chairman Ernst questioned if it would be a legislative remedy at the next session for the remainder of 2011. Commissioner Heaton responded yes, out of courtesy to the author of the legislation that there be communication in dialogue before the Board meeting regarding upcoming issues, which would then go to the Board for a decision. Mr. Metzger agreed to contact Senator Morrell.

Mr. Metzger recommended developing a form letter sent to political subdivisions. If no action is taken, follow through on the lease.

Commissioner Hoffman suggested putting a legal notice in the paper on January 1st stating we have this property available for lease, anybody interested please contact us. We have put everybody on notice, every political subdivision that picks up the paper and it says it is all on lease. If anybody comes back at us we could say we put the notice in the official journal. It would solve all issues and we would do it once at the beginning of the year and we only have to do it for one year.

Mr. Metzger agreed stating it is not a standard right of first refusal. It says, "If the Authority determines that the sale, lease or transfer of its property is appropriate, it shall first offer the property to political subdivisions in the parish in which the property is located and state agencies conducting operations in their parish". We intend to lease everything the Levee District has. We intend to enter into new slip leases. Maybe this is the easiest way to approach it and eliminate the problem which only exists for one more year.

Commissioner Hoffman added we can always go back to the legislature. This way we can say we have complied.

Chairman Ernst offered a motion for legal notice in the official journal regarding property for lease, seconded by Commissioner Bridges and unanimously adopted for recommendation to the full board.

Chairman Ernst addressed plenary authority with respect to 2011 and questioned in Sections 3, 4 and 5, the plenary authority which has always been extended to the Orleans Levee District; is that extended to the new Authority that comes into existence in 2012 because there is no statutory language.

Mr. Metzger informed they removed what they had in 330.12.1 and the temporary 330.12.1. The permanent legislation states you are a political subdivision possessing full corporate power to manage, control, regulate or operate all assets of the District. This has got to be read in conjunction with the remaining sections in Title 38E which extends authority to the Authority. Section 336 gives this Board plenary authority and that has not been touched. Even after the permanent 330.12.1, you still will have plenary authority under Section 336.

Chairman Ernst then suggested we be even clearer by specifically stating that the 2012 Authority shall be the successor to the State and the Board of Commissioners. To make sure that is the case that should be addressed for 2012; that we are the successor of the Orleans Levee District. Chairman Ernst suggested approaching the appropriate representative or senator to consider a possible amendment next session and added that this be put on a list of things to be discussed and considered. Mr. Metzger added he would put it on a list and present it in a politically correct way. Commissioner Heaton suggested Mr. Metzger come back in case the Board has questions as the Board needs to be aware that there are modifications that need to be made. Commissioner Heaton suggested this be put on the Board Agenda for the next meeting.

Mr. Metzger addressed Section G in both the temporary and permanent 330.12.1 regarding development of a management plan, which is something the Board needs to be addressing and working on. It is Section G in 330.12.1 and it is effective now. I wanted to call it to the Committee's attention.

Mr. Capo clarified leasing slips in South Shore today or waiting until notice is posted in the paper. Mr. Metzger advised to lease the slips.

Commissioner Heaton added to formalize what we have said to have as an Agenda item discussion of Act 1014. Commissioner Heaton then requested Mr. Pappalardo present to the Board practical applications or challenges this bill presents on the real estate issue and Mr. Pappalardo agreed.

ANNOUNCEMENT OF NEXT LEGAL COMMITTEE MEETING

Chairman Ernst announced the next Legal Committee meeting will be held on Thursday, January 13, 2011 at 3:30.

ADJOURNMENT

Commissioner Bridges moved for a motion to adjourn, seconded by Commissioner Hassinger and unanimously adopted.

The meeting adjourned at 4:46 p.m.