

**NON-FLOOD PROTECTION ASSET MANAGEMENT AUTHORITY
LEGAL COMMITTEE MEETING MINUTES
APRIL 7, 2011 – 3:30 P.M.**

The Legal Committee meeting of the Non-Flood Protection Asset Management Authority was held on Thursday, April 7, 2011 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 3:51 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 Wilma Heaton

FURTHERMORE PRESENT

Chairman Robert E. Smith Lupo

ABSENT

Commissioner Michael Bridges
Commissioner Joe Hassinger
Commissioner Patrick DeRouen

STAFF

Louis Capo, Executive Director
Sharon Martiny, Non-Flood

ALSO PRESENT

Gerard Metzger
Thomas Anzelmo
Albert Pappalardo

APPROVAL OF AGENDA

Chairman Lupo offered a motion to adopt the agenda, seconded by Commissioner Heaton and unanimously adopted.

APPROVAL OF PRIOR MINUTES

Chairman Lupo offered a motion to approve the minutes of the special Legal Committee meeting of March 21, 2011, seconded by Commissioner Heaton and unanimously adopted.

OLD BUSINESS

1) Landry's Litigation

Mr. Thomas Anzelmo advised that the Board authorized to seek writs to the Louisiana Supreme Court in connection with an adverse decision of the 4th Circuit Court of Appeal. On March 25, 2011, the Supreme Court unanimously denied the writs ending the litigation regarding the actual amount of the annualized rent. The benefit is that Landry's wanted the rent to be much lower than \$165,000.00. The remaining issue is the complaint by Landry's regarding

application of the CPI pursuant to the terms and conditions of the lease. That number has been carefully computed based upon the decision of the Court of Appeal that it was going to be \$165,000 even in advance of the Supreme Court's determination. A request was sent to Landry's to which Landry's did not respond. Landry's counsel was contacted to no avail. A notice of eviction was issued which prompted the Federal Express letter of March 31, 2011 to Mr. Capo. The letter stated that the Court of Appeal fixed the rent at \$165,000 which could not be adjusted. Landry's offered a compromise of \$173,250.00 which was rejected. Landry's has paid under protest the total amount of \$181,500 as demanded. Mr. Capo informed that Landry's was in arrears for the CPI adjustment only. Mr. Anzelmo advised that the Authority should assume that Landry's would pay under protest the additional CPI increase; if not, we will move to evict for non-payment of rent. Mr. Anzelmo advised that payment under protest does not give Landry's any leverage but should they bring a declaratory judgment stating that the number is inappropriate, Landry's would state that this was paid under protest and seek to have the sums recouped at a later time. This company has been very aggressive so it would not be unexpected if a declaratory judgment was filed. Commissioner Ernst questioned the time line between filing for the Writ and the denial because this happened rather quickly. Mr. Anzelmo advised this took approximately 60 days as the Supreme Court is working at a faster pace. It is Mr. Anzelmo's opinion that the Supreme Court has codified a bad decision which created a precedent for future catastrophes in which the written document is not applicable if a case can be made that you should not be paying because you suffered in some way. It seems to diminish the effect of what a ground lease actually is. This case will be reported, but until it is released it is subject to withdrawal.

Chairman Lupo questioned if Mr. Pappalardo calculated the figure that the tenant is paying under protest and if the proceeding rental payment was to be adjusted. Mr. Pappalardo advised that he used the \$165,000 figure to add the CPI adjustment to. The concept of the lease and several of the major ground leases is that every 10 years it is re-appraised as land only. The rationale for that was to mark the ground rent to market over a 50-60 year lease because we can have a period of low inflation over time that would not be keeping pace with the actual market value. By fixing that rate at the 10th year, that is the base for the next CPI. This was re-appraised in 2005. The court stated that the value that should have been in place instead of \$210,000 was \$165,000 because the judge asked the appraiser to look at two different time frames. The judge instructed the appraiser to appraise it as of the 2005 date and also to let the Judge know what it would be worth in 2010. The appraiser set the 2005 value at \$200,000 per year; a 5% swing on that is in the realm of an effective correct appraisal. Because of the economy and a 2009 recession, the appraiser said it would be worth \$165,000. Not only did the judge reach back and invalidate the \$210,000 appraisal, she effectively set her own date for when the rent should have been indexed. This astonished the attorneys involved because this became the appraised value from 2005 forward. The importance of this protest is that because the lease states that the rent is re-set based upon the appraisal every 10 years, it also states if in fact the value has not increased that you shall pay no less than the previous rent. The concept of reducing the CPI increase to the \$165,000 could effectively create an \$82,500 difference over the 10 years because it would keep in place the rent that we have now by the CPI. Effectively the offer that the tenant made was to take the \$16,500 increase to the \$165,000 that is represented by the CPI and cut that in half and only pay \$8,250 over the \$165,000. If they did that, and in 4 years from now we find that the economy is still sluggish and it does not produce the amount of rent that would increase that amount or go beyond that amount that would be the rent for another 5 years. That is why it is important for us to maintain that our CPI application is absolutely valid because that will be the floor in 2015.

1) By-Laws

Mr. Metzger advised that he received a copy of the Flood Authority's By-Laws and used these as a base document and merged into those By-Laws all of the provisions in Title 38 that applied to the Management Authority as well as the Open Meetings Law. Mr. Metzger stated that we do not need the definition of "Business Day" because it is not used in the By-Laws. In Article 2 the title is Official Domicile and Logo and Seal; Composition needs to be removed because it is inapplicable. He also put in the By-Laws that when January 1, 2012 comes the Authority becomes a political subdivision and independent of issues dealing with Agency relationships and LADOTD. In Section 2 of Article 3 the annual financial disclosure provision was moved to the end because it is an entire independent section and so the entire second paragraph has been stricken. Under Terms of Office, there is no provision in the statute dealing with removal of members. Removal is a concept that is common so this provision was inserted. Powers and Duties of the Management Authority are laid out in Section 5. Currently, Board members do not receive any remuneration but starting January 1, 2012 members are entitled to payment of no more than \$50 for attendance at a meeting. Travel rates are separate and based on the federal rate. Some boards pay the DOA approved travel amount which counts as a travel reimbursement. Mr. Metzger advised the same rates are received on mileage and travel expenses with no more than \$50 for attendance at meetings of the Management Authority or its Committees. Commissioner Heaton advised of a Statute under Title 38 on levee boards which sets a maximum per diem amount that could be received per year of no more than \$2,400. Chairman Lupo suggested including in the By-Laws a yearly limit on per diems to be reviewed annually by the full Board. Commissioner Heaton stated that the By-Laws would not have to be amended if the policy was changed; you want to leave the By-Laws as flexible as possible but still structured. Commissioner Heaton advised that you could accept the By-Laws but you did not have to take the per diem. Mr. Metzger advised that the Board could establish a per diem or vote that there will be no per diem.

The provisions on meetings set the third Thursday of every month for Management Authority meetings, except in November as the meetings will be one week before in observance of the Thanksgiving holiday. Chairman Ernst who is also Secretary to the full Board, clarified that the word "Secretary" in the By-Laws referred to the Secretary of the Management Authority and not the Secretary to the Full Board. Mr. Metzger confirmed that it would be the Secretary or the Executive Director or his designee. Mr. Metzger stated that the Chairman was set up as Chairman of the Board and the Executive Director was set up as the Chief Executive Officer depending on what the Board wants. It is traditional that the Chairman of the Board is the "Chairman of the Board," not the Chief Executive Officer. Special meetings were set up so either the Chairman or three authority members could call a special meeting. Emergency meetings (hurricanes, etc.) can be called by the Chairman or in his absence the Vice Chairman; in the absence of the Chairman or Vice Chairman, by any member or the Executive Director. Verbal notice for an emergency meeting is required and only what is on the Agenda for the emergency meeting can be discussed.

Under "Agenda", a member can request that something be placed on the agenda up to two days before the meeting. A Quorum will be a majority of the members of the Authority and all votes are by majority, except for executive sessions, adding items to the agenda and for removal of officers. A 2/3 vote is required to go into executive session. A unanimous vote is required to add something to the Agenda as required by law, and 2/3 vote for removal of officers. The Chairman will appoint all members of all committees. There is also a mechanism for removal a committee member for cause with a 2/3 vote required. The vote required a 2/3 vote of those people duly appointed at that time. Chairman Ernst requested that the By-Laws be left in draft form so they could be discussed by the full Board. Chairman Lupo questioned how the Board would remove a Chairman and Mr. Metzger informed that the Chairman is elected annually. In

Article 4 Section 2, it is a 2/3 vote to remove an officer of the Board. All members of the Board are voting members. The Chairman of the Board has a right to vote on all issues.

There is very little regarding the duties of the vice chairman with the exception of sitting in the place of the Chairman when the Chairman is not available. The Chairman's duties are limited because we are going to have a Chief Executive Officer in place of the Executive Director who serves for the Management Authority. There is one provision regarding giving the Executive Director the authority to enter into contracts up to a certain amount of money without Board resolution or approval. Chairman Ernst stated that this is something that needs to be done and suggested the amount of \$25,000. Chairman Ernst suggested to continue the discussion on the By-Laws at the next Legal committee meeting. Commissioner Heaton moved to continue to work on the By-Laws and have something to present after the next Legal Committee meeting, which would give the Legal Committee one more month to review the By-Laws. Mr. Metzger stated he would red-line the By-Laws and circulate them to the committee members.

ANNOUNCE NEXT LEGAL COMMITTEE MEETING

The next meeting of the Legal Committee is scheduled for Thursday, May 5, 2011 at 3:30 p.m.

ADJOURN

Chairman Lupo offered a motion to adjourn, seconded by Commissioner Heaton and unanimously adopted. The meeting adjourned at 4:34 p.m.